74-6471

Supreme Court, U. S.
FILED
NOV 25 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-....

THE STATE OF NEW YORK and the NEW YORK STATE HOUSING FINANCE AGENCY,

Petitioners,

against

MILTON FORMAN and ELLEN FORMAN, et al.,

Respondents,

and

UNITED HOUSING FOUNDATION, INC., et al.,

Additional-Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Petitioners
State of New York and
New York State Housing
Finance Agency
Office & P. O. Address
Two World Trade Center
New York, New York 10047
Tel. (212) 488-3446

TABLE OF CONTENTS

	PAGE
Opinions Below	2
Jurisdiction of This Court	2
The Questions Presented	3
The Statutes and Rules Involved	3
Statement of the Case	3
Proceedings Below	4
Reasons for Granting Certiorari	4
Conclusion	15
Appendix D	17
Appendix E	18

Table of Authorities

Cases:

DeVoe v. *Ostrander*, Civ. No. C 3, 74-95 (S.D. Ohio, decided October 18, 1974) 15

Dugan v. *Rank*, 372 U.S. 609, 620 (1963) 13, 14

Edelman v. *Jordan*, 415 U.S. 651 (1974) 6, 8, 9, 10, 15

Employees v. *Missouri Public Health Employees*, 411 U.S. 279 (1973) 6, 8, 9, 10, 11, 15

Ford Motor Co. v. *Department of Treasury of Indiana*, 323 U.S. 459, 465-466, 65 S.Ct. 347, 89 L.Ed. 389 (1945) 12, 13

Great Northern Life Ins. Co. v. *Read*, 322 U.S. 47, 54, 64 S.Ct. 873, 877, 88 L.Ed. 1121 (1944) 12, 14

J. I. Case v. *Borak*, 377 U.S. 426, 12 L. Ed. 2d 423, 84 S. Ct. 1555 (1964) 7

PAGE

Jordan v. *Gilligan*, 400 F 2d 701, 706 15

Kennecott Copper Corp. v. *State Tax Comm.*, 327 U.S. 573, 577, 66 S.Ct. 745, 90 L.Ed. 862 (1946) 13

Knight v. *State of New York*, 443 F. 2d 415 .....12, 13, 15

MacKethan v. *Commonwealth of Virginia*, 370 F. Supp. 1 (E. D. Va. 1974) 11

Mader v. *Armel*, 402 F.2d 158 (6th Cir. 1968) 8

Maryland v. *Wirtz*, 392 U. S. 183 (1968) 9

Mathews v. *Fisher*, No. 8482 (S. D. Ohio 1974) 11

Murray v. *Wilson Distilling Co.*, 213 U.S. 151, 171, 53 L. Ed., 742, 29 S. Ct. 458 (1909) 8

Parden v. *Terminal Railway of Alabama Docks Department*, 377 U.S. 184 (1964) 5, 6, 8, 9, 10, 11, 14

People v. *Brooklyn Garden Apartments*, 283 N.Y. 373 (1940) 15

Petty v. *Tennessee-Missouri Bridge Comm'n.*, 359 U. S. 275 (1959) 8

Rothstein v. *Wyman*, 467 F. 2d 226, 238 (2nd Cir. 1972), cert. den. 411 U.S. 921 (1973) 14

Whitten v. *State University Construction*, 42 LW 2506 (decided March 5, 1974) 15

Statutes:

New York Private Housing Finance Law, § 32(5) 3, 4, 12, 17

Article 2 (Mitchell-Lama law) 3, 12, 13

PAGE

New York Public Housing Law,

§ 15 12

§ 3, subd. 1, D 13

§ 2, subd. 15 13

42 U.S.C., § 1983 4

§ 50 14

Securities Act of 1933,

Section 17(a) 7, 8

Section 18 9

Securities Exchange Act of 1934,

Section 10(b) 7

Rule 10b-5 7

Section 28 9

15 U.S.C. § 77r 9

15 U.S.C. § 78bb 9

Miscellaneous:

1964 New York State Legislative Annual, p. 342 12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-....

THE STATE OF NEW YORK and the NEW YORK STATE HOUSING FINANCE AGENCY,

Petitioners,

against

MILTON FORMAN and ELLEN FORMAN, et al.,

Respondents,

and

UNITED HOUSING FOUNDATION, INC., et al.,

Additional-Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners, the State of New York and State Housing Finance Agency, respectfully pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, dated June 12, 1974, reversing a judgment of the United States District Court for the Southern District of New York, which had dismissed the complaint in this action.

Another petition has been filed for such a writ by the other defendants herein (No. 74-157). At the time of such

filing, the State petitioners still had pending before the Second Circuit a motion for rehearing. Such rehearing was denied on September 12, 1974.

The State petitioners now join in the petition filed by the other petitioners. To avoid repetition, we state that we adopt the position of those petitioners: that "membership" in or share ownership in a state-financed and supervised non-profit cooperative housing corporation, as described by the District Court (Exh. B, p. 4), did not constitute a "security" within the ambit of the Securities Act of 1933 and the Securities and Exchange Act of 1934 for the reasons, among others, stated in their petition (No. 74-157).

This petition is presented on *additional* grounds which affect only the State petitioners: the immunity of the State from suit in the federal courts by reason of the provisions of the Eleventh Amendment; and the gross misinterpretation by the Second Circuit of the provisions of a state statute, New York Private Housing Finance Law, § 32(5) providing for only a limited waiver of sovereign immunity.

Opinions Below

The opinion of the Court of Appeals is reported at 500 F 2d 1246; and is set forth in Appendix A to the connected petition (No. 74-157). The opinion of the District Court is reported at 366 F. Supp. 1117; and is set forth in Appendix B to that petition (No. 74-157).

Jurisdiction of This Court

The judgment sought to be reviewed was entered on June 12, 1974 and is set forth in Appendix C to petition 74-157. The petitioners' motion for rehearing was denied by Court of Appeals order, dated September 12, 1974 and is set forth in Appendix D to this petition.

The Questions Presented

In addition to the questions presented by petition 74-157, this petition presents the following questions:

1. Does a State waive its Eleventh Amendment immunity from suit in the federal courts by regulating the issuance of share membership in a cooperative housing corporation and by supervision of the construction of a low and middle income housing project, essentially non-profit in nature, particularly where such a corporation is furnished substantial subsidies through the aid in financing it received through mortgages provided at low interest rates by the State Housing Finance Agency?

2. Did the Court of Appeals misconstrue New York Private Housing Finance Law § 32(5) by giving it a blanket waiver construction (not shown to be attributed to it by the New York courts), even though the statute permits the State its Commissioner or its "supervising agency" (which the Housing Finance Agency is *not*) to be sued in the same manner as a private person, but only as to duties and liabilities arising out of Article 2 of the New York Private Housing Finance Law (known as the Mitchell-Lama Law)?

The Statutes and Rules Involved

The statutes and Rules involved are: those set forth in petition 74-157; and, in addition, as to the State petitioners, New York State Finance Law, § 32(5), which we reproduce herein as Appendix E.

Statement of the Case

We adopt, for the purpose of this additional petition, the statement set forth in petition 74-157 (pp. 4-9).

Proceedings Below

The portion of the prior petition's analysis of the proceedings below is accurate; and we adopt that analysis as to those proceedings insofar as they affect all defendants.

As to the state petitioners, it should be noted, however, that the Second Circuit passed upon Eleventh Amendment and immunity issues which the District Court, in dismissing the complaint herein, did not even reach. The Court of Appeals held the New York State Housing Finance Agency to be a "person" within the meaning of 42 U.S.C., § 1983; and found that the State itself had expressly waived immunity by the provisions of New York Private Housing Finance Law, § 32(5). See Appendix A to petition 74-157 (pp. 20-22).

Reasons for Granting Certiorari

(1)

We support fully the reasons set forth in the petition filed by the other petitioners-defendants (no. 74-157, pp. 11-27).

(2)

Additional reasons for granting a writ of certiorari stem from the unnecessary burden which will be imposed upon New York taxpayers and the federal courts by the continued presence in this litigation of the New York State Housing Finance Agency and the State itself as defendants. Even more significant from a national point of view is the implication of the Court of Appeals decision that a State has voluntarily subjected itself, by a limited waiver of immunity, to liability in the federal courts for the acts or omissions of a state regulatory agency in supervising the sponsorship, planning, development, construction and initial management of a state-aided real estate project, constructed entirely within the geographical limits of the State.

(A)

In the event that this Court permits the State's regulation of the development and financing of this new City to become the subject of litigation in federal Courts, it may be anticipated that an appropriate review of the details of such development and financing will also encumber the calendars of one or more District Court judges for years.

As a matter of court administration, this Court, even though it might not ordinarily choose to pass prior to final judgment, upon the Eleventh Amendment and immunity issues which we urge were erroneously decided by the Second Circuit, will surely recognize that it is judicially desirable not to burden the District Court with the task of reviewing unnecessarily the extraordinary issues which the State's defense of its regulatory processes will entail.

If the case goes back to the District Court in its present posture, with the Second Circuit's rulings on the Eleventh Amendment and immunity issues as the law of the case, the State may be obligated, upon a step-by-step basis, to attempt to justify each of the regulatory decisions involved in the development, construction and financing of the new City of 15,400 housing units. Our new Rome was not built in a day. Moreover, it was built during a period when an unprecedented inflationary economy caused the developers and regulatory agency to reevaluate prior judgments repeatedly to meet constantly changing conditions. A mass of material may accumulate in this single trial which will approach the volume presented to this Court in its current October Term. If this accumulation can be dispensed with, it should be.

(B)

The Second Circuit opinion, with reference to the State's Eleventh Amendment argument for dismissal, relied on the decision in *Parden* v. *Terminal Railway of Alabama Docks*

Department, 377 U.S. 184 (1964); but completely and blissfully disregarded this Court's decision in *Edelman* v. *Jordan*, 415 U.S. 651 (1974), which had been decided less than three months before and which effectively distinguished the *Parden* decision.

We shall argue, if certiorari is granted, that the Court of Appeals decision conflicts with the rationale of this Court's recent decision in *Edelman, supra*. By reason of a similar lapse and a failure, in addition, to understand the history of New York's efforts to develop adequate housing facilities, it found *Employees* v. *Missouri Public Health Dept.*, 411 U.S. 279 (1973) to be distinguishable, 500 F. 2d 1246, 1256, fn. 13.

We shall also assume, for the purpose of this subdivision of our argument that the State was engaged in the regulation of "securities" in the development of this cooperatively organized, state subsidized and state-aided housing development. Of course, we adhere to the argument presented by our co-defendants that the State's regulation did not relate to "securities" as federally defined.

(1)

In determining whether Congress has, in a particular instance, exercised its power to require waiver of immunity, federal courts must, of course, exercise their skills in statutory construction. Fortunately, this Court has given a great deal of recent guidance in how these skills are to be exercised.

The first question which must be answered is whether Congress has authorized suit of the sort sought to be brought against a class of defendants which includes the States. Justice Rehnquist stated this requirement in *Edelman, supra*, as follows (p. 678):

> "But in this case the threshold fact of congressional authorization to sue a class of defendants which literally includes States is wholly absent."

When the instant case is measured against that standard, it fails. Congress has never authorized suit under either the 1933 or 1934 Acts against a class of defendants including States for violations of Section 17(a) of the 1933 Act or Section 10(b) of the 1934 Act.

Consider first the 1934 Act, upon which the plaintiffs principally rely. That statute contains no section authorizing a private right of action against *any* defendant for violation of Section 10(b). Section 10(b), as written by Congress, was to be enforced by the Securities Exchange Commission.

Of course, the courts have implied a private right of action for violations of Section 10(b) and Rule 10b-5. But Mr. Justice REHNQUIST makes it clear that an implied right of action will not satisfy the "threshold" test of *Edelman* (p. 679):

> "And while this Court has, in cases such as *J. I. Case* v. *Borak*, 377 U. S. 426, 12 L. Ed. 2d 423, 84 S. Ct. 1555 (1964), authorized suits by one private party against another in order to effectuate a statutory purpose, it has never done so in the context of the Eleventh Amendment and a state defendant."

The logic of Justice Rehnquist's position is convincing. The question before a court looking at an asserted implied waiver of the Eleventh Amendment is whether Congress intended to require that waiver. Surely no Congressional intent to require waiver can be found in court creation of a private right of action.

Just as there is no Congressional authorization under the 1934 Act to sue a class of defendants including States, so also there is no such authorization under the 1933 Act for violations of Section 17(a). Section 17 of the 1933 Act is a criminal provision, obviously intended by Congress to be enforced as are all federal criminal laws. Congress created no private right to sue for violation of Section 17.

Some courts have implied a private right of action for violation of Section 17(a), *Mader* v. *Armel,* 402 F. 2d 158 (6th Cir. 1968). But an implied private right of action does not meet the "threshold" test of *Edelman.*

In sum, neither statute relied upon by the plaintiffs is sufficient to satisfy the test of *Edelman* v. *Jordan.* In neither act has Congress authorized suit against States for the sorts of violations alleged in the Complaint here.

(2)

In addition, this Court requires a showing that Congress intended to abrogate State immunity.

> "The question of waiver or consent under the Eleventh Amendment was found in those cases [*Employees, Parden* and *Petty* v. *Tennessee-Missouri Bridge Comm'n.,* 359 U. S. 275 (1959)] to turn on whether Congress had intended to abrogate the immunity in question, and whether the State by its participation in the program authorized by Congress had in effect consented to the abrogation of that immunity." *Edelman, supra,* at 678.

This showing must be a strong one, since

> "Constructive consent is not a doctrine commonly associated with the surrender of constitutional rights . . ." *Id.*

The court in *Edelman* adhered to its previous standard of explicit abrogation of the immunity,

> ". . . we will find waiver only where stated 'by the most express language or by such overwhelming implications from the text as will leave no room for any other reasonable construction.' *Murray* v. *Wilson Distilling Co.,* 213 U. S. 151, 171, 53 L. Ed. 742, 29 S. Ct. 458 (1909)." *Id.*

Even if there were a right of action against States under the 1933 and 1934 Acts, that would not necessarily imply Congress intended federal court jurisdiction of that right. In *Employees, supra,* the court affirmed its previous holding (*Maryland* v. *Wirtz,* 392 U. S. 183 (1968)) that Congress had created a right of action against the States. But the court denied this right implied any remedy by suit in federal court. In fact, the teaching of *Employees* is that Congress can and does create rights without remedies, at least where the remedy sought is a suit against an unconsenting State in federal court.

In both the 1933 and 1934 statutes, Congress carefully preserved the jurisdiction of the States to regulate securities. Section 18 of the 1933 Act provides:

> "Nothing in this subchapter shall affect the jurisdiction of the securities commission (or any agency or office performing like functions) of any State or Territory of the United States, or the District of Columbia, over any security or any person." (15 U.S.C. § 77r)

In nearly identical language, Section 28 of the 1934 Act preserves State jurisdiction under that Act (15 U.S.C. § 78bb). It would be strange, indeed, to discover that Congress had taken such great pains to protect explicitly State regulation of securities and then silently intended that, if any State exercised that jurisdiction, it would forfeit its Eleventh Amendment immunity.

Indeed, the very argument is absurd. If States had to risk federal court damage suits for huge amounts of money by regulating securities, they would all surely abandon the field. But that is clearly not what Congress intended when it so explicitly protected their jurisdiction.

In *Parden,* there was a statute which satisfied the "threshold" test of *Edelman* (See *Edelman* opinion at 678), but that is certainly not the case here. Entirely apart from

Edelman, the reach of *Parden* is severely restricted by *Employees.* Mr. Justice Douglas explained (p. 256):

> "Parden involved the railroad business which Alabama operated 'for profit.' [citation omitted.] Parden was in the area where private persons and corporations normally ran the enterprise."

Alabama was engaged in what Justice Douglas called an an "isolated state activity" of a proprietary nature usually performed by private enterprise. There was no logical reason to exclude the tiny minority of railroad workers employed by States from the coverage of the FELA; the court found Congress intended no such exclusion. Proprietary operation of a railroad is no essential governmental function and Alabama entered into it, the court found, knowing it would waive its Eleventh Amendment immunity thereby.

But the kind of implicit waiver in *Parden* is as far as this Court would go. Justice DOUGLAS found the operation of state hospitals involved in *Employees* was not a proprietary, but a governmental, function. (*Id.* at 256). And Justice MARSHALL, concurring, found Missouri had no real choice about operating its hospitals and thus did not "consent" to federal jurisdiction by continuing to operate them after the FLSA was amended. He said (p. 263):

> "For me at least, the concept of implied consent or waiver relied upon in Parden approaches, on the facts of that case, the outer limit of the sort of voluntary choice which we generally associate with the concept of constitutional waiver . . . [In contrast with *Parden*]. It obviously is a far different thing to say that a State must give up established facilities, services, and programs or else consent to federal suit."

If the ownership and operation of state hospitals is not a proprietary act which waives Eleventh Amendment im-

munity, *a fortiori* a purely governmental act such as regulation of securities does not do so.

In *MacKethan* v. *Commonwealth of Virginia,* 370 F. Supp. 1 (E. D. Va. 1974), Judge Merhige faced precisely the same issue which is now before this Court. There also a receiver of a savings and loan association sought to hold the Virginia banking authorities liable under the federal securities legislation on grounds of negligent supervision. Judge Merhige dismissed the Complaint, stating (370 F. Supp. 1, 4):

> "Plaintiff now attempts to extend the *Parden* doctrine into the area of pure governmental regulation. Such effort, in the Court's view, must fail. The impetus toward application of the *Employees* rationale is stronger here than in the case in which it was announced. While the operation of hospitals is not necessarily a governmental function, the specific nature of the hospitals involved in *Employees* gave state activity in that area a traditional base. In the present context, the state activity attacked is necessarily of a governmental nature. Regulation of securities is not an endeavor in which private persons are free to participate."

There is no language in the 1933 or 1934 Acts to support the plaintiffs' theory of waiver. *Employees* holds waiver must be supported by explicit language and fails to find it in the semi-proprietary activity of owning and operating hospitals. Judge Merhige in *MacKethan* supports conclusion here that the securities situation is even clearer than *Employees.* See also the opinion of Judge Hogan in *Mathews* v. *Fisher,* No. 8482 (S. D. Ohio 1974). The Second Circuit's theory of waiver is not sound in any respect.

(C)

The Second Circuit demonstrated a complete lack of familiarity with the functioning of the Mitchell-Lama Act and other provisions of New York's Private Housing Finance Law.

To illustrate: the panel's rejection of the State's claim of immunity is predicated upon its citation of Private Housing Finance Law, § 32(5). A footnote in that opinion sets forth that section, with emphasis added (500 F. 2d 1246, 1256, fn. 12):

> "With regard to duties and liabilities arising out of this article the state, the commissioner or the supervising agency may be sued *in the same manner as a private person.* No costs shall be awarded against the commissioner, the state, or the supervising agency, as the case may be, in any such litigation."*

With reference to State immunity from suit in *federal* courts, the panel completely ignored the caveat by Judge FRIENDLY in *Knight* v. *State of New York,* 443 F. 2d 415, in a decision by this very same Circuit, where he carefully noted (p. 419):

> "the Supreme Court has admonished that federal courts ought not 'to be astute to read the consent to embrace a Federal as well as state courts and that only a 'clear indication' of the state's intention to submit to suit in federal courts will surmount the Eleventh Amendment's bar, *Great Northern Life Ins. Co.* v. *Read,* 322 U.S. 47, 54, 64 S.Ct. 873, 877, 88 L.Ed. 1121 (1944). See, to the same effect, *Ford Motor Co.*

---

* The first sentence of this paragraph merely incorporated, with an appropriate addition of the words, "the supervising agency", the suability provision previously contained in Public Housing Law, § 15, as to the housing commissioner and the State. See 1964 New York State Legislative Annual, p. 342.

> v. *Department of Treasury of Indiana,* 323 U.S. 459, 465-466, 65 S.Ct. 347, 89 L.Ed. 389 (1945); *Kennecott Copper Corp.* v. *State Tax Comm.,* 327 U.S. 573, 577, 66 S.Ct. 745, 90 L.Ed. 862 (1946). We find no such 'clear indication' here."

With reference to the Housing Finance Agency, the panel completely overlooked the fact that the term "supervising agency" contained in the section quoted by Judge Oakes is strictly defined in Public Housing Law, § 2, as follows (Subd. 15):

> "The comptroller in a municipality having a comptroller; in a municipality having no comptroller, the chief fiscal officer of such municipality; except that in the city of New York it shall be the housing and development administration."

Further confusion in this litigation could be avoided by a complete deletion from the Second Circuit's opinion of its analysis relating to the defenses of the State and its Agency. The fact that the Agency is an "agency" does *not* qualify it as a "supervising agency".* In fact, it is a financing agency. Private Housing Finance Law, Art. 3. And if the purpose of this litigation is to impose any liability upon it, that liability may be borne ultimately by the State itself, regardless of any prior statutory commitments or prohibitions. In this aspect of the case, this Court can not blink its eyes at the fact that in *Knight* v. *State,* 443 F. 2d 415, this same Circuit Court also pointed out (443 F. 2d, at p. 420) that Knight's suit against state officers could be deemed a suit against the State, improperly brought; and noted the general rule in *Dugan* v. *Rank,* 372

---

* Supervision of a state-aided limited profit company is assigned to the State Commissioner of Housing and Community Renewal, a person who has *not* even been made a party to this lawsuit. See Private Housing Finance Law, Art. 2; and Public Housing Law, § 3, subd. 1, Definitions (L. 1961, c. 398).

U.S. 609, 620 (1963) that:

> "a suit is against the sovereign if 'the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration,' • • • or if the effect of the judgment would be 'to restrain the Government from acting, or to compel it to act.'"

See also the opinion of Judge McGowan for a unanimous court (Friendly, Ch. J. and Timbers, C.J.) in *Rothstein* v. *Wyman*, 467 F. 2d 226, 238 (2nd Cir. 1972), cert. den. 411 U.S. 921 (1973) rehearing den. 411 U.S. 988 (1973), underlining the rule that any waiver of the shield of the Eleventh Amendment must be shown to be clear and unequivocal, citing *Great Northern Life Ins. Co.* v. *Read*, 322 U.S. 47, 54 (1944) and effectively distinguishing *Parden* (*supra*).

The waiver set forth in Private Housing Finance Law can not, on its face, be deemed to be a clear and unequivocal relinquishment of the State's immunity from *federal* court suit. Moreover, the Second Circuit's analysis completely disregards the fact that, as to obligations issued by the Agency itself specific judicial remedies are provided by New York Private Housing Law, § 50.

If the terms of the Finance Agency's mortgages are to be subjected to change by the federal district courts, and supervision of non-profit state-subsidized projects are to be subjected to the vagaries of a single District Judge's conception of a tenant's expectation of profit from participation in a non-profit cooperative enterprise, the District Court's assumption of jurisdiction for that purpose will be self-defeating. The wisdom and propriety of any additional subsidies to the plaintiffs should be determined by the people's representatives in the Legislature, not by the federal courts.

Conclusion

The Second Circuit's decision ignores this Court's decision in *Edelman* v. *Jordan* (*supra*). To avoid any further confusion in this action and to avoid the risk, which the Court of Appeals decision presents, of impairing the viability of the State's Mitchell-Lama housing program, a writ of certiorari should be granted. On its face, the panel's decision completely ignores the Circuit's own holding in *Knight* v. *State, supra,* 443 F. 2d 415. It also ignores the philosophy of the First Circuit decision in *Whitten* v. *State University Construction,* 42 LW 2506 (decided March 5, 1974). And its attempt to distinguish the recent decision in *Employees* v. *Missouri Public Health Employees,* 411 U.S. 279 (1973), on the ground that the State's housing activity came *after* the enactment of the federal securities laws is predicated upon a completely factual misconception; and a failure to recognize New York's long history of seeking to solve its housing problems by various methods including a State Housing Law (L. 1926, C. 823), which provided for limited divided housing companies (akin to limited-profit companies authorized by the Mitchell-Lama Act) and state supervision long before the Federal Securities Act of 1933. See *People* v. *Brooklyn Garden Apartments,* 283 N.Y. 373 (1940). See also *DeVoe* v. *Ostrander,* Civ. No. C 3, 74-95 (S.D. Ohio, decided Oct. 18, 1974), where the *Forman* reasoning as to waiver of State immunity for alleged improper regulation has already been rejected; and the cases cited therein.

The purpose of the Eleventh Amendment was to protect the States' fiscal integrity from attack in federal court. *Jordan* v. *Gilligan,* 400 F 2d 701, 706. If the Second Circuit's theory in this case were adopted, it would substantially undermine that constitutional policy, for States would be target defendants in virtually every stock fraud case where they had done any regulation. States would be faced

with huge contingent liabilities or the option of abandoning securities regulaition. Neither result was intended by the Congress or the framers of the Eleventh Amendment.

Respectfully submitted,

Louis J. Lefkowitz
Attorney General of the
State of New York
Attorney for Petitioners
State of New York and
New York State Housing
Finance Agency
Office & P. O. Address
Two World Trade Center
New York, New York 10047
Tel. (212) 488-3446

by Daniel M. Cohen
Assistant Attorney General and
Member of the Bar of the United
States Supreme Court

APPENDIX D

(Prior Appendices are contained in No. 74-157)

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the ninth day of September, one thousand nine hundred and seventy-four.
Present:

HON. PAUL R. HAYS
HON. JAMES L. OAKES,
Circuit Judges,
HON. A. SHERMAN CHRISTENSEN,
District Judge

Docket No. 73-2613

MILTON and ELLEN FORMAN, EARLE and PATRICIA MCFIELD, MICHAEL and PHYLLIS SICILIAN, JACK and DIANE R. BLACKIN, CARL and ALMA TROST, ROBERT and PAULINE CARRINGTON, GILBERT and GLORIA NARINS, MURRAY and HELENE VICTOR, JEROME and LEONARE BAER, HAROLD ASNIN, JOSEPH S. and WANDA D. O'CONNOR, et al.,
Plaintiffs-Appellants,

v.

COMMUNITY SERVICES, INC., UNITED HOUSING FOUNDATION, et al.,
Defendant-Appellee.

A petition for a rehearing having been filed herein by counsel for the appellee,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. DANIEL FUSARO
Clerk

APPENDIX E

§ 32. Supervision and regulation

The commissioner or the supervising agency, as the case may be, may:

* * * * * *

5. (a) Administer oaths, take affidavits, hear testimony and take proof under oath at public or private hearings; (b) subpoena and require the attendance of witnesses and the production of books and papers pertaining to any investigations and inquiries authorized by this article and examine them in relation to any matter concerning which the power to investigate is granted; (c) issue commissions for the examination of witnesses who are out of the state or unable to attend or are excused from attendance; (d) investigate into the affairs of a company and into the dealings, transactions or relationships of such company with third persons and into the affairs of any person, firm, corporation or other entity having a financial interest, whether direct or indirect, in the design, construction, acquisition, reconstruction, rehabilitation, improvement, financing or operation of any project undertaken by a company (e) intervene, as a matter of right, in any action or proceeding of which notice shall be given affecting the project of a company; (f) take such steps in such action or proceeding as may be necessary to protect the public interest.

With regard to duties and liabilities arising out of this article the state, the commissioner or the supervising agency may be sued in the same manner as a private person. No costs shall be awarded against the commissioner, the state, or the supervising agency, as the case may be, in any such litigation.

Supreme Court, U. S.
FILED
DEC 23 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-647

THE STATE OF NEW YORK and the
NEW YORK STATE HOUSING FINANCE AGENCY,

Petitioners,

—v.—

MILTON FORMAN and ELLEN FORMAN, *et al.*,

Respondents,

—and—

UNITED HOUSING FOUNDATION, INC., *et al.*,

Additional Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

GEORGE BERGER
40 West 57th Street
New York, New York 10019
Attorney for Respondents

JAY F. GORDON
PHILLIPS, NIZER, BENJAMIN,
KRIM & BALLON
Of Counsel

TABLE OF CONTENTS

PAGE

Questions Presented 2

Statement of the Case 2

The Proceedings Below 7

Reasons for Denial of the Petition 8

1. The Case Is Not Yet Ripe for Review 8
2. The Agency Cannot Assert the Defense of Eleventh Amendment Immunity 9
3. The Defense of Eleventh Amendment Immunity Has Been Waived by the State Both by Statute and by Conduct 10

Conclusion 16

Table of Authorities

Cases:

Baron v. Shields, 131 F. Supp. 370 (S.D.N.Y. 1955) 13

Braun v. State, 203 Misc. 563, 117 N.Y.S.2d 601 (Ct. Cl. 1952) 10

Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R., 389 U.S. 327 (1967) 8

Chicago & N.W. Ry. v. Osborne, 146 U.S. 354 (1892) 8

Ciulla v. State, 191 Misc. 528, 77 N.Y.S.2d 545 (Ct. Cl. 1948) 10

PAGE

DeVoe v. Ostrander, No. C-3-74-95 (S.D. Ohio, October 18, 1974) 15

Edelman v. Jordan, 415 U.S. 651 (1974) 14
Employees v. Missouri Public Health Department, 411 U.S. 279 (1973) 14

Hamilton-Brown Shoe Co. v. Wolf Brothers & Co., 240 U.S. 251 (1916) 8
Hill York Corp. v. American International Franchises, Inc., 448 F.2d 680 (5th Cir. 1971) 13

Kent v. Quicksilver Mining Co., 78 N.Y. 159 (1879) 11
Knight v. New York, 443 F.2d 415 (2d Cir. 1971) 11

MacKethan v. Virginia, 370 F. Supp. 1 (E.D. Va. 1974) 15
Maryland v. Baltimore Radio Show, 338 U.S. 912 (1950) 8
Matherson v. Long Island State Park Commission, 442 F.2d 566 (2d Cir. 1971) 9
Mathews v. Fisher, No. C-1-74-284 (S.D. Ohio, April 16, 1974), *appeal docketed sub nom.* Yeomans v. Kentucky Department of Banking and Securities, No. 74-2003 (6th Cir., September 4, 1974) 15
Mayfield v. First National Bank, 137 F.2d 1013 (6th Cir. 1943) 10

New York Dormitory Authority v. Span Electric Corp., 18 N.Y.2d 114, 271 N.Y.S.2d 983 (1966) 9

Parden v. Terminal Ry. of the Alabama Docks Department, 377 U.S. 184 (1964) 14, 16
Petty v. Tennessee-Missouri Bridge Commission, 359 U.S. 275 (1959) 11

PAGE

Prendergast v. Long Island State Park Commission, 330 F. Supp. 438 (E.D.N.Y. 1970) 9

Raub v. Gerkin, 127 App. Div. 42, 111 N.Y.S. 319 (2d Dep't 1908) 11

SEC v. Chinese Consol. Benevolent Ass'n, 120 F.2d 738 (2d Cir.), *cert. denied*, 314 U.S. 618 (1941) 12

Story House Corp. v. New York Job Development Authority, 37 App. Div. 2d 345, 325 N.Y.S.2d 659 (3d Dep't 1971), *aff'd mem.*, 31 N.Y.2d 942, 340 N.Y.S.2d 929 (1972) 9-10

Tcherepnin v. Knight, 389 U.S. 332 (1967) 13

Vincent v. P.R. Matthews Co., 126 F. Supp. 102 (N.D. N.Y. 1954) 11

Zeidner v. Wulforst, 197 F. Supp. 23 (E.D.N.Y. 1961) 9

Constitutional Provisions:

N.Y. Const. Art. XVIII, § 6 (McKinney) 3

U.S. Const. Amend. 11 ..... 9, 10, 12, 14, 16

Statutes:

N.Y. Public Authorities Law §§ 1682-86, 1805-09 *et passim* (McKinney) 3

N.Y. Public Housing Law § 15 (McKinney) 10

N.Y. Real Property Actions and Proceedings Law § 1541 (McKinney) 11

N.Y. State Housing Law
L. 1926, Ch. 823, *repealed by* L. 1939, Ch. 808, § 227 15

PAGE

N.Y. State Mitchell-Lama Act
Private Housing Finance Law §§ 1-59 (McKinney) .. 2
§ 11 5
§ 13 ..... 5, 6
§ 15(c) 6
§ 17 6
§ 20(1) 6
§ 21 6
§ 22(2) 4, 15
§ 25 ..... 4, 15
§ 26(1)(b) 4, 15
§ 27 6
§ 29 6
§ 31(1) 6
§ 32 ..... 6, 11
§ 32(1) 11
§ 32(5) 10, 11, 12, 14
§ 32(7) 6
§§ 40-59 3
§ 43(2) 5, 6
§ 44 3
§ 44(1) 9
§ 44(9) 6
§ 46(8) 3, 9
§ 47 3
§ 55 6

Securities Act of 1933
§ 2(2), 15 U.S.C. § 77b(2) 12
§ 3(a)(2), 15 U.S.C. § 77c(a)(2) 13

PAGE

Securities Exchange Act of 1934
§ 3(a)(9), 15 U.S.C. § 78c(a)(9) 12
§ 3(a)(10), 15 U.S.C. § 78c(a)(10) 7
§ 3(a)(12), 15 U.S.C. § 78c(a)(12) 13
§ 10(b), 15 U.S.C. § 78j(b) 13
§ 27, 15 U.S.C. § 78aa 26-27

Rule:

Fed. R. Civ. P. 12 7

Other Authorities:

Black's Law Dictionary 1059 (rev. 4th ed. 1968) 10

Hearings on H.R. 4314 Before the House Committee on Interstate and Foreign Commerce, 73d Cong., 1st Sess. (1933) 13, 14

Hearings on H.R. 7852 and 8720 Before the House Committee on Interstate and Foreign Commerce, 73d Cong., 2d Sess. (1934) 12

Hearings on S. 875 Before the Senate Committee on Banking and Currency, 73d Cong., 1st Sess. (1933) 13

Hearings on S. Res. 56, 84 and 97 Before the Senate Committee on Banking and Currency, 73d Cong., 1st Sess. (1934) 12-13

H.R. Rep. No. 85, 73d Cong., 1st Sess. (1933) 12, 14

Memorandum of the Joint Legislative Committee on Housing and Multiple Dwellings (1961), *reprinted in* New York State Legislative Annual—1961 3

[1972] Op. N.Y. Att'y Gen. No. 56-B 9

PAGE

Report of the Joint Legislative Committee on Housing and Multiple Dwellings (1955), *reprinted in part following* N.Y. Private Housing Finance Law § 10 (McKinney) 3

R. Robertson & F. Kirkham, Jurisdiction of the Supreme Court of the United States § 130 (2d ed. R. Wolfson & P. Kurland 1951) 8

S. Rep. No. 47, 73d Cong., 1st Sess. (1933) 14

R. Stern & E. Gressman, Supreme Court Practice § 4.19 (4th ed. 1969) 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-647

THE STATE OF NEW YORK and the
NEW YORK STATE HOUSING FINANCE AGENCY,

Petitioners,

—v.—

MILTON FORMAN and ELLEN FORMAN, *et al.*,

Respondents,

—and—

UNITED HOUSING FOUNDATION, INC., *et al.*,

Additional Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

This brief is submitted in opposition to a petition for a writ of certiorari by the State of New York (State) and the New York State Housing Finance Agency (Agency) to review an interlocutory judgment of the United States Court of Appeals for the Second Circuit remanding this action to the United States District Court for trial (C1-2).* The unanimous decision of the Court of Appeals is reported at 500 F.2d 1246.

---

* An earlier petition for a writ of certiorari in this case (Docket No. 74-157) has been pending since August 22, 1974. All "A," "B," and "C" references are to the pages of petitioners' appendices in the prior petition. All "D" and "E" references are to the pages of the appendices to the petition herein.

Questions Presented

1. Whether this case is ripe for review, where the Court of Appeals has merely upheld federal jurisdiction, has made no findings on the merits and has remanded the case to the District Court for further proceedings.

2. Whether this Court should grant certiorari to review a finding of waiver of Eleventh Amendment immunity in a case where the Eleventh Amendment is not even applicable to the Agency.

3. Whether this Court should grant certiorari to the State where there is the clearest unequivocal waiver of the Eleventh Amendment immunity both by statute and conduct.

Statement of the Case

This action arises out of the public solicitation of venture capital* by the sale of common stock for the construction of a mammoth cooperative housing development (A3). The respondents, purchasers of the common stock in issue, seek to represent 15,372 purchasers similarly situated, many of whom have invested their life savings in this enterprise (A3-4).

The project was constructed and financed under the New York State Mitchell-Lama Act, N.Y. Private Housing Finance Law §§ 1-59 (McKinney). Central to that statute

---

* As the Court of Appeals observed, if the enterprise were to fail, respondents would have lost their entire investment (A18).

is the mechanism for substantial* financing** of housing by the New York State Housing Finance Agency.*** N.Y. Private Housing Finance Law §§ 40-59 (McKinney).

Pursuant to the Mitchell-Lama Act, the project had a sponsor, United Housing Foundation (UHF). The general contractor and sales agent for the project was Com-

---

* *Vide infra* at 4-5.

** Petitioners repeatedly refer to the cooperative housing project as state "subsidized" (pages 3, 6, 14). In point of fact this is palpably misleading. The Mitchell-Lama Act was designed in part to provide for "State aid, *without cash subsidy provisions,* for the development of housing projects by housing companies formed under this Act." Report of the Joint Legislative Committee on Housing and Multiple Dwellings (1955) (emphasis added), *reprinted in part following* N.Y. Private Housing Finance Law § 10 (McKinney), at 8. Indeed, the very purpose of the statute was "to clarify the distinction between full-subsidized, low-income public housing programs administered by the State and its municipalities and *housing programs undertaken by private entrepreneurs with only limited public assistance, in the form of mortgage loans, aid in land assembly or site acquisition or tax abatement for a limited period.*" Memorandum of the Joint Legislative Committee on Housing and Multiple Dwellings (1961), *reprinted in* New York State Legislative Annual—1961, at 244, 245 (emphasis added). Pursuant to Article XVIII of the New York State Constitution, State subsidies are limited to projects which are "restricted to persons of low income as defined by law." N.Y. Const., Art. XVIII, § 6 (McKinney).

*** Temporary and long term financing of such developments is undertaken by the Agency through the sale of long term tax exempt bonds. The Agency is a corporation separate from the State and its bonds are not full faith and credit bonds of the State of New York. N.Y. Private Housing Finance Law § 46(8) (McKinney). Their tax exempt status results in a lower interest rate than corporate bonds would ordinarily yield, which in turn, produces an ultimate benefit to the stockholders and residents of the development. This type of financing is very common in New York; *viz.*, New York State Dormitory Authority, New York State Job Development Authority (N.Y. Public Authorities Law §§ 1682-86, 1805-09 (McKinney), and the entire statute generally). See also N.Y. Private Housing Finance Law §§ 44, 47 (McKinney Supp. 1974).

munity Services, Inc. (CSI), a corporation organized under the New York Business Corporation Law (McKinney) and a wholly-owned subsidiary of UHF (A4). The cooperative housing corporation, Riverbay Corporation (Riverbay), whose common stock was sold to the respondents, owns the land and buildings constituting the project (A4). The individual defendants herein, officers and directors of Riverbay, are also directors or officers, or both, of UHF and CSI (A5). Consequently, Riverbay was and is under the domination and control of UHF and CSI (A5).

Just as with every other large-scale public offering, the sale of Riverbay common stock was promoted by means of a prospectus, called in this instance an "Information Bulletin." Pursuant to a subscription agreement accompanying that Information Bulletin, every subscriber agreed to purchase 18 shares of Riverbay stock at $25 par value per share for each room in the subscriber's apartment, for an initial purchase price amounting to $450 per room (A5).*

Unlike the ordinary offering in which the State would have a purely governmental interest of regulation, under the Mitchell-Lama Act the State had a substantial proprietary interest in the public sale of stock. Under that statute, the State's participation in the financing of a project is limited to a specified percentage of the project cost, with the balance furnished by the purchasers of the stock. N.Y. Private Housing Finance Law §§ 22(2), 25 and 26(1)(b) (Mc-

---

* The project had 72,896 rooms and the original purchase price paid by respondents was $32,795,550 (171a). The total purchase price was fixed at $3,856 per room (346a) but was raised to $5,737 per room (353a) as a result of the fraudulent conduct set forth in the amended complaint. The original total purchase price of this public offering, $283,695,550, was increased to $418,203,982 (compare 171a with 353a).

Kinney). In the instant case, as earlier noted, $32,795,550 in cash was provided by the respondents. That money had to be provided by respondents before the Agency could have furnished the financing for the balance of the project cost. *Id.* Were it not for the respondents' money, the State would not have the very housing it had determined was a public necessity. N.Y. Private Housing Finance Law § 11 (McKinney Supp. 1974). Without the public sale of these securities to the respondents, to quote the petition (page 5), the State would not have had its "new Rome."

Moreover, the State received $3,510,000 as a supervision fee and the Agency received $1,170,000 as a financing fee for this project from Riverbay and thus from the respondents (353a, 356a). Consequently, in addition to the Legislative decision to fulfill a State need for housing by using private and not public funds, the Mitchell-Lama Act actually placed the State in the business of supervising and financing such housing for a substantial fee.

Not only did the State have a proprietary interest in selling Riverbay's stock, it had absolute control over the development of this project from inception to completion. State regulation and supervision of housing enterprises built under the Mitchell-Lama Act is mandated by law. No cooperative corporation can be created under this statute without the approval of the Commissioner of the State Division of Housing.* N.Y. Private Housing Finance Law § 13 (McKinney).

---

* The close interrelationship between the Commissioner and the Agency is underlined by the fact that the "chairman" of the Agency and its "chief executive officer" is the same "commissioner of housing" (N.Y. Private Housing Finance Law § 43(2)). This firm requirement was amended out of the statute after the relevant

The cooperative corporation cannot borrow or give security without the Commissioner's approval (*Id.* § 20(1)); its capital structure is dictated by law and subject to the Commissioner's approval (*Id.* § 21); the cooperative may not acquire real property, enter into any contract for construction or alteration of any real property, or sell any property, encumber or lease any real property, make any contracts for operation of the project, issue a guarantee of payment or enter into contracts for payment of salaries to officers or employees without the Commissioner's approval (*Id.* §§ 17, 27, 29). The Commissioner has the power to fix or to overrule the cooperative's rental structure (*Id.* § 31(1)); to investigate all aspects of the affairs of the cooperative and its dealings with others (*Id.* § 32); and, in the event that the cooperative violates any provision of its certificate, or of law, or of the mortgage, or of any order of the Commissioner, the Commissioner has the power to remove all of the cooperative's directors and to replace them with his own designees (*Id.* §§ 13, 15(c)) and to commence an action in the Supreme Court of New York for the purpose of having such violations stopped or prevented (*Id.* § 32(7), *as amended* (McKinney Supp. 1974)). Thus, from the initiation of a project and continuing thereafter State control is pervasive.

---

dates herein by L.1969, chap. 528, § 3, but the Commissioner of Housing remained a member of the Agency and could be named chairman by the Governor (*Id.* § 42(2)). Significantly, the Agency's ability "to make mortgage loans and to undertake commitments to make mortgage loans" was and still is expressly made "[s]ubject to the approval of the commissioner of housing" (*Id.* § 44(9)). Apart from the Commissioner's absolute control of the Agency's ability to grant mortgage loans, he is by law "designated to act for and in behalf of the agency in servicing the mortgage loans . . . of the agency" (*Id.* § 55).

The Proceedings Below

Respondents filed their amended complaint in October, 1972. All petitioners moved, pursuant to Fed. R. Civ. P. 12 for a dismissal thereof for lack of federal jurisdiction (B4). The State and the Agency moved, in addition, on the grounds urged herein. The District Court dismissed the complaint on the ground that Riverbay stock was neither "stock" nor an "investment contract" within the meaning of Section 3(a)(10) of the Securities Exchange Act (B4), never reaching the issues raised herein. On appeal, the State and the Agency argued for affirmance as to them by reason of their special defenses, as well as joining in the arguments of the other defendants. On June 12, 1974, the Court of Appeals unanimously reversed (A20), upheld federal jurisdiction, overruled the State's and Agency's special defenses, and remanded the case to the District Court for further proceedings (A22, C2). On September 9, 1974, the Court of Appeals denied rehearing (D18) and rehearing en banc. On November 25, 1974, seventy-six days later, the within petition was filed.

Reasons for Denial of the Petition

1. *The Case Is Not Yet Ripe for Review.*

On the petitioners' motion, the United States District Court dismissed the amended complaint for "lack of subject matter jurisdiction" (B29). The United States Court of Appeals "[e]xpressing no opinion whatsoever on the merits," nevertheless "reversed" and "remanded . . . for further proceedings in accordance with [its] opinion. . . ." (A3, C2).

Consequently, the judgment sought to be reviewed is not final, but interlocutory and is therefore not yet ripe for review by this Court. *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967); R. Robertson & F. Kirkham, Jurisdiction of the Supreme Court of the United States § 130, at 232-33 (2d ed. R. Wolfson & P. Kurland 1951); R. Stern & E. Gressman, Supreme Court Practice § 4.19, at 180 (4th ed. 1969). See also *Maryland* v. *Baltimore Radio Show*, 338 U.S. 912, 917-18 (1950); *Hamilton-Brown Shoe Co.* v. *Wolf Brothers & Co.*, 240 U.S. 251, 258 (1916); *Chicago & N.W. Ry.* v. *Osborne*, 146 U.S. 354, 355 (1892).

In an effort to overcome this defect, petitioners urge that in the event this Court does not grant certiorari at this time, the State would be put to the burden of defending its conduct by a "step-by-step" review of its regulatory processes before it could seek certiorari on an expanded record (page 5). Obviously, this argument could be and undoubtedly has been expounded by every petitioner who has sought certiorari of an interlocutory judgment and thus presents no valid reason for departing from the estab-

lished rule. Moreover, as above indicated, this action involves far more than the State's performance of its regulatory functions over the sale of securities by others. It involves a legally-mandated public sale of common stock to raise venture capital in order for the State to fulfill its housing program and further involves a statutory plan of regulation with respect to that housing where the State's supervisory role was all-pervasive.

2. *The Agency Cannot Assert the Defense of Eleventh Amendment Immunity.*

Regardless of this Court's determination whether or not to grant certiorari to the State to review the Eleventh Amendment issue, it is clear that no such defense is available to the Agency and it must remain a defendant in the pending action. The Agency is "a public benefit corporation" with the power "to sue and be sued." N.Y. Private Housing Finance Law § 44(1) (McKinney). It is a separate "legal public entity." [1972] Op. N.Y. Att'y Gen. No. 56-B. The State is, by statute, not liable for the Agency's notes or bonds, which are not debts of the State. N.Y. Private Housing Finance Law § 46(8) (McKinney). It has been repeatedly held, by federal and New York courts alike, that substantially similar governmental entities do not have immunity under the Eleventh Amendment. See *Matherson* v. *Long Island State Park Commission,* 442 F.2d 566 (2d Cir. 1971); *Prendergast* v. *Long Island State Park Commission,* 330 F. Supp. 438 (E.D.N.Y. 1970); *Zeidner* v. *Wulforst,* 197 F. Supp. 23 (E.D.N.Y. 1961); *New York Dormitory Authority* v. *Span Electric Corp.,* 18 N.Y.2d 114, 271 N.Y.S.2d 983 (1966); *Story House Corp.* v. *New York Job Development Authority,* 37 App. Div. 2d 345, 325 N.Y.S. 2d 659 (3d Dep't 1971), *aff'd mem.,* 31 N.Y.2d 942, 340 N.Y.S.

2d 929 (1972); *Braun* v. *State,* 203 Misc. 563, 117 N.Y.S.2d 601 (Ct. Cl. 1952); *Ciulla* v. *State,* 191 Misc. 528, 77 N.Y.S. 2d 545 (Ct. Cl. 1948).

3. *The Defense of Eleventh Amendment Immunity Has Been Waived by the State Both by Statute and by Conduct.*

As hereinabove indicated, the Eleventh Amendment defense is not available to the Agency at all. To the extent that the defense may be applicable to the State, it has been waived. Section 32(5) of the N.Y. Private Housing Finance Law itself unequivocally provides:

> "Supervision and regulation
>
> • • •
>
> With regard to duties and liabilities arising out of this article* the state, the commissioner or the supervising agency may be sued in the same manner as a private person."**

The word, "liability," is a term "of the most comprehensive significance, including almost every character of hazard or responsibility, absolute, contingent, or likely." Black's Law Dictionary 1059 (rev. 4th ed. 1968). See also *Mayfield* v. *First National Bank,* 137 F.2d 1013, 1019 (6th Cir. 1943).

---

* "This article" is, as the petition concedes (page 3), the entire Mitchell-Lama Act.

** Except for the virtually identical provision in Section 15 of the N.Y. Public Housing Law (McKinney), there is no other New York statute corresponding to section 32(5), nor, as far as we can ascertain from decisions involving statutory waiver of Eleventh Amendment immunity, is there a parallel provision in the laws of any other State. Consequently, the issue presented on this petition is not of sufficiently general application to merit this Court's attention.

As indicated above, the supervisory functions of the State through the Commissioner with respect to cooperative housing constructed and sold under "this article" are all-pervasive. The Commissioner is, *inter alia,* charged with responsibility to see that Riverbay complies "with law."* N.Y. Private Housing Finance Law § 32(1) (McKinney). Thus, if Riverbay's stock was sold in violation of the antifraud provisions of the federal securities laws, then the State failed to carry out its duty under "this article" and could "be sued in the same manner as a private person."

Ironically, the State, in its first "Question Presented" asks, in the very words of the title of Section 32, if by "supervision and regulation," the statutory waiver is applicable (page 3). Since the Legislature has seen fit to place the waiver under that title, it obviously has answered that question in the affirmative.

Waivers of immunity by a state couched in language far less comprehensive than that employed in the N.Y. Private Housing Finance Law § 32(5) quoted above have been construed as a consent to suit in the federal court. See, *e.g., Petty* v. *Tennessee-Missouri Bridge Commission,* 359 U.S. 275 (1959); *Vincent* v. *P.R. Matthews Co.,* 126 F. Supp. 102 (N.D.N.Y. 1954).**

---

* "Law," as employed in other statutes, has been interpreted by the New York Courts to mean "laws of the land." *Kent* v. *Quicksilver Mining Co.,* 78 N.Y. 159, 182 (1879); *Raub* v. *Gerkin,* 127 App. Div. 42, 44, 111 N.Y.S. 319, 320 (2d Dep't 1908).

** The statute involved in *Knight* v. *New York,* 443 F.2d 415 (2d Cir. 1971) cited by petitioners (pages 12-13, 15) was N.Y. Real Property Actions and Proceedings Law § 1541 (McKinney), which provides only that "an action may be maintained . . . by or against the people of the State of New York," a statute totally different from Section 32(5).

Regardless of Section 32(5), it is clear that the State has waived its Eleventh Amendment immunity by its action. Pursuant to its Constitutional power to regulate interstate commerce, Congress enacted the Securities Act of 1933 (1933 Act) and the Securities Exchange Act of 1934 (1934 Act). In enacting those statutes, Congress clearly intended to include States within the definition of "person" in Section 2(2) of the 1933 Act, 15 U.S.C. § 77b(2), and Section 3(a)(9) of the 1934 Act, 15 U.S.C. § 78c(a)(9). House Report No. 85, 73d Cong., 1st Sess. 11 (1933), stated:

> "Paragraph (2) [of the 1933 Act] defines 'person' in terms sufficiently broad to include within that conception not only an individual but also every form of commercial organization that may issue securities. *It includes within the concept of 'person' a government or a political subdivision thereof,* although later sections of the bill exempt from its provisions securities issued by the U.S., a State or a territory, or a political subdivision of any these governmental units." • (Emphasis added)

See also H.R. Rep. No. 85, *supra* at 14.

The legislative history of the 1934 Act also reveals that Congress considered a state to be a "person" within the meaning of Section 3(a)(9) of that statute as well. See Hearings on H.R. 7852 and 8720 Before the House Committee on Interstate and Foreign Commerce, 73d Cong., 2d Sess. 298, 720-21, 753 (1934); Hearings on S. Res. 56, 84 and 97 Before the Senate Committee on Banking and Cur-

---

• The term "person" has been held to be broad enough to include even a foreign country. See *SEC* v. *Chinese Consol. Benevolent Ass'n,* 120 F.2d 738 (2d Cir.), *cert. denied,* 314 U.S. 618 (1941).

rency, 73d Cong., 1st Sess. 6903, 7038, 7446 (1934). In *Baron* v. *Shields,* 131 F. Supp. 370, 372 (S.D.N.Y. 1955), the District Court upheld the sufficiency of a complaint against a public instrumentality of the State of Nebraska under Section 10(b) of the 1934 Act, 15 U.S.C. § 78j(b). The provisions exempting certain State securities from formal registration with the SEC (Section 3(a)(2) of the 1933 Act and Section 3(a)(12) of the 1934 Act)* did not, of course, exempt the State from the antifraud provisions in issue herein. *Tcherepnin* v. *Knight,* 389 U.S. 332, 344 (1967); *Hill York Corp.* v. *American International Franchises, Inc.,* 448 F.2d 680, 695 (5th Cir. 1971); *Baron* v. *Shields, supra.* Moreover, why would Congress have to enact an exemption for certain State securities, if a State were not a "person" subject to the provisions of the statutes?

Thus, when the State enacted the Mitchell-Lama Act in 1955, and when it codified the Act in 1961, it did so with the knowledge that the plan of cooperative housing created by the statute would put the State directly into transactions involving subscriptions for stock in cooperative corporations solicited through the use of the mails, which had already been the subject of antifraud legislation by Congress pursuant to its commerce power. The State's

---

* Congress' concern for the marketability of State and municipal bonds led to the creation of a limited exemption for "securities which are direct obligations of or obligations guaranteed as to principal or interest by a State or any political subdivision thereof." 1934 Act § 3(a)(12), 15 U.S.C. § 78c(a)(12); cf. 1933 Act § 3(a)(2), 15 U.S.C. § 77c(a)(2). See Hearings on S. Res. 56, 84 and 97, *supra* at 7543-44; Hearings on H.R. 4314 Before the House Committee on Interstate and Foreign Commerce, 73d Cong., 1st Sess. 29 (1933); Hearings on S. 875 Before the Senate Committee on Banking and Currency, 73d Cong., 1st Sess. (1933). Obviously, Riverbay's stock was not such an exempted security.

voluntary entry into this sphere must therefore be construed as a waiver by conduct of its Eleventh Amendment immunity. *Parden* v. *Terminal Ry. of the Alabama Docks Department,* 377 U.S. 184 (1964).

Parden was cited with approval in this Court's more recent decisions of *Edelman* v. *Jordan,* 415 U.S. 651 (1974) and *Employees* v. *Missouri Public Health Department,* 411 U.S. 279 (1973), which latter decisions actually held that the immunity had not been waived. However, both of those cases are factually distinguishable for several reasons:

1. There is a clear, unequivocal statutory waiver by the State in Section 32(5).

2. Congress, as above indicated (pages 12-13, *supra*), has clearly set forth its intention to include "States" within the coverage of the federal securities laws.* Unlike the statute at issue in *Edelman,* where this court found that the Social Security Act did not create a private cause of action, or in *Employees,* where there was concurrent jurisdiction in the State courts, Congress, in enacting the 1934 Act, specifically and affirmatively placed exclusive jurisdiction for violations thereof in the federal courts, thereby indicating its determination to condition a State's future activities in the areas circumscribed by the 1934 Act upon a waiver of its Eleventh Amendment immunity. 1934 Act

---

* Petitioners' argument that Congress, in enacting both the 1933 Act and the 1934 Act "carefully preserved the jurisdiction of the States to regulate securities" (page 9) is completely misplaced. Congress, in enacting these statutes, determined to subject securities, which had theretofore been subject to State control, to federal regulation as well. H.R. Rep. No. 85, 73d Cong., 1st Sess. 10, 27-28 (1933); S. Rep. No. 47, 73d Cong., 1st Sess. 2, 4 (1933); Hearings on H.R. 4314 Before the House Committee on Interstate and Foreign Commerce, 73d Cong., 1st Sess. 29 (1933).

§ 27, 15 U.S.C. § 78aa. The Mitchell-Lama Act was enacted twenty years *after* the passage by Congress of the 1933 Act and 1934 Act.*

3. The State in the instant case is not merely regulating the issuance of securities by others. The sale of cooperative stock to the public is a *sine qua non* of the statutory scheme for all cooperative housing provided pursuant to the Mitchell-Lama Act. N.Y. Private Housing Finance Law §§ 22(2), 25 and 26(1)(b) (McKinney). The initial venture capital *must* come from the stockholders. The State also derives millions of dollars in revenue from supervision and financing. In that context, the State has acted in a proprietary and not merely in a governmental role in this case. Moreover, under the Mitchell-Lama Act, the State's governmental role in this enterprise was far greater than what is normally understood by the term, "regulation". As above demonstrated, the State had virtually absolute control over the entire project from inception to completion.

MacKethan v. *Virginia,* 370 F. Supp. 1 (E.D. Va. 1974), and the unreported decisions, *Mathews* v. *Fisher,* No. C-1-74-284 (S.D. Ohio, April 16, 1974), *appeal docketed sub nom. Yeomans* v. *Kentucky Department of Banking and Securities,* No. 74-2003 (6th Cir., September 4, 1974), and *DeVoe* v. *Ostrander,* No. C-3-74-95 (S. D. Ohio, October 18, 1974), cited by petitioners (pages 11 and 15) as expressing a contrary view are both questionable authority and distinguishable on their facts. First, in all of these cases,

---

* The State's reference to a State Housing Law enacted in 1926 (page 15) is also misplaced because that statute (L.1926, ch. 823) did not provide in any way for the sale of stock to the public, nor did it contain any provision similar to Section 32(5).

the district courts distinguished *Parden* without giving any consideration of the legislative history discussed above showing Congress' expressed intent to include States as "persons" within both the 1933 Act and 1934 Act. Further, they are distinguishable in that, in those cases, the State's role was purely that of regulating the actions of the issuer in the traditional governmental sense. As indicated on pages 4-5, *supra,* in the instant case, the State of New York had a proprietary interest in the public sale of Riverbay's stock, a $4,680,000 financial interest in a successful public sale and absolute control over Riverbay from inception to completion.

CONCLUSION

The petition for a writ of certiorari, to the extent presented by the Agency, is academic because the Eleventh Amendment immunity is inapplicable to the Agency. The petition, to the extent presented by the State, should be denied because it arises from an interlocutory order and the defense sought to be upheld has been waived by statute and by conduct.

Respectfully submitted,

GEORGE BERGER
Attorney for Respondents

JAY F. GORDON
PHILLIPS, NIZER, BENJAMIN,
KRIM & BALLON
Of Counsel

Supreme Court, U. S.
FILED
MAR 6 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-647 and 74-157

THE STATE OF NEW YORK and the NEW YORK STATE HOUSING FINANCE AGENCY,

against *Petitioners,*

MILTON FORMAN and ELLEN FORMAN, et al.,

and *Respondents,*

UNITED HOUSING FOUNDATION, INC., et al.,

against *Petitioners,*

MILTON FORMAN, et al.,

Respondents.

ON CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONERS THE STATE OF NEW YORK AND THE NEW YORK STATE HOUSING FINANCE AGENCY

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Petitioners,
State of New York and
New York State Housing Finance
Agency
Two World Trade Center
New York, New York 10047
212—488-3446

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

DANIEL M. COHEN
Assistant Attorney General

MEMBERS OF THE BAR OF THE
UNITED STATES SUPREME COURT
of Counsel

TABLE OF CONTENTS

	PAGE
Jurisdiction	1
The Questions Presented	2
Opinions Below	3
The Statutes and Rules Involved	3
Statement of the Case	3
Proceedings Below	3
Preliminary Point	4
POINT I—The Court of Appeals completely disregarded this Court's decision in *Edelman* v. *Jordan,* 415 U.S. 651 (1974). By reason of this lapse and its failure to understand the history of New York's efforts to develop adequate housing facilities, it erroneously relied upon *Parden* v. *Terminal Railway of Alabama Docks Department,* 377 U.S. 184 (1964); and held *Employees* v. *Missouri Health Department,* 411 U.S. 279, to be distinguishable	5
POINT II—The Court of Appeals demonstrated a complete lack of familiarity both with the functioning of New York's *Mitchell-Lama* Act and other provisions of New York's Public and Private Housing Finance Laws	11
Conclusion	18

Cases: PAGE

DeVoe v. *Ostrander*, Civ. No. C 3, 74-95 (S.D. Ohio, decided October 18, 1974) 18

Dugan v. *Rank*, 372 U.S. 609, 620 (1963) 13

Edelman v. *Jordan*, 415 U.S. 651 (1974) 5, 6, 7, 8, 18

Employees v. *Missouri Public Health Employees*, 411 U.S. 279 (1973) 5, 7, 8, 9, 10, 18

Ford Motor Co. v. *Department of Treasury of Indiana*, 323 U.S. 459, 465-466, 65 S.Ct. 347, 89 L.Ed. 389 (1945) 11

Fruhling v. *Amalgamated Housing Corp.*, 9 N Y 2d 541, 175 N.E. 2d 156 (1961) 16

Great Northern Life Ins. Co. v. *Read*, 322 U.S. 47, 54, 64 S.Ct. 873, 877, 88 L.Ed. 1121 (1944) 11, 13

J. I. Case v. *Borak*, 377 U.S. 426, 12 L. Ed. 2d 423, 84 S. Ct. 1555 (1964) 6

Jordan v. *Gilligan*, 400 F.2d 701, 706 19

Kennecott Copper Corp. v. *State Tax Comm.*, 327 U.S. 573, 577, 66 S.Ct. 745, 90 L.Ed. 862 (1946) 11

Knight v. *State of New York*, 443 F.2d 415 (2d Cir. 1971) 11, 12, 18

Lincoln Bldg. Associates v. *Barr*, 1 N Y 2d 413, 135 N.E. 2d 801 (1956) 14

MacKethan v. *Commonwealth of Virginia*, 370 F. Supp. 1 (E. D. Va. 1974) 10

Mader v. *Armel*, 402 F.2d 158 (6th Cir. 1968) 7

Maryland v. *Wirtz*, 392 U. S. 183 (1968) 8

Mathews v. *Fisher*, No. 8482 (S. D. Ohio 1974) 10

Matter of New York City Housing Authority v. *Muller*, 270 N.Y. 333, 1 N.E. 2d 153 (1936) 14

PAGE

Murray v. *Wilson Distilling Co.*, 213 U.S. 151, 171, 53 L. Ed., 742, 29 S. Ct. 458 (1909) 7

Parden v. *Terminal Railway of Alabama Docks Department*, 377 U.S. 184 (1964) 5, 7, 8, 9, 10, 13

People v. *Brooklyn Garden Apartments*, 283 N.Y. 373, 28 N.E. 2d 877 (1940) 18

People ex rel. Durham R. Corp. v. *La Fetra*, 230 N.Y. 429, 130 N.E. 2d 601 (1921) 14

Petty v. *Tennessee-Missouri Bridge Comm'n.*, 359 U.S. 275 (1959) 7

Rothstein v. *Wyman*, 467 F. 2d 226, 238 (2nd Cir. 1972), cert. den. 411 U.S. 921 (1973) 13

United Housing Foundation, Inc. v. *Forman* (No. 74-157) 1

Whitten v. *State University Construction*, 493 F.2d 177 (1st Cir. 1974) 18

Statutes:

New York Private Housing Finance Law,

§ 32(5) 2, 3, 11, 12

§ 50 13

Article 2 (Mitchell-Lama law) 12

New York Public Housing Law,

§ 15 12

§ 3, subd. 1 12

§ 2, subd. 15 12

42 U.S.C., § 1983 3

PAGE

Securities Act of 1933,

Section 17(a), 15 U.S.C. § 77q(a) 6, 7

Section 18, 15 U.S.C. § 77r 8

Securities Exchange Act of 1934,

Section 10(b), 15 U.S.C. § 78j(b) 6

Rule 10b-5 6

Section 28, 15 U.S.C. § 78bb 8

Miscellaneous:

1964 New York State Legislative Annual, p. 342 12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-647 and 74-157

THE STATE OF NEW YORK and the NEW YORK STATE HOUSING FINANCE AGENCY,

Petitioners,

against

MILTON FORMAN and ELLEN FORMAN, et al.,

Respondents,

and

UNITED HOUSING FOUNDATION, INC., et al.,

Petitioners,

against

MILTON FORMAN, et al.,

Respondents.

ON CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONERS THE STATE OF NEW YORK AND THE NEW YORK STATE HOUSING FINANCE AGENCY

Jurisdiction

On January 20, 1975, this Court granted the petitions of the State of New York and the New York State Housing Finance Agency for a writ of certiorari herein; and consolidated this case with *United Housing Foundation, Inc.* v. *Forman* (No. 74-157) in which a petition for certiorari

was also granted to review the judgment of the United States Court of Appeals entered June 12, 1974 (Appendix C to petition in No. 74-157). Rehearing had been denied to the State petitioners by a Court of Appeals order dated September 12, 1974 (Appendix D to petition in No. 74-647).

The Questions Presented

1. To avoid repetition, we state our support, at the outset, for the arguments made by the petitioners in the United Housing Foundation case (74-157) and for their position that the subscriptions to shares in the Foundation's cooperative development did not constitute "securities" within the contemplation of the Securities Act of 1933 or the Securities Exchange Act of 1934.

We shall confine ourselves to the following additional questions:

2. Does a State waive its Eleventh Amendment immunity from suit in the federal courts by regulating the issuance of share membership in a cooperative housing corporation and by supervision of the construction of a low and middle income housing project, essentially nonprofit in nature, particularly where such a corporation is furnished substantial subsidies through the aid in financing it received through mortgages provided at low interest rates by the State Housing Agency?

3. Did the Court of Appeals misconstrue New York Private Housing Finance Law § 32(5) by giving it a blanket waiver construction (not shown to be attributed to it by the New York courts), even though the statute permits the State, its Commissioner or its "supervising agency" (which the Housing Finance Agency is *not*) to be sued in the same manner as a private person, but only as to duties and liabilities arising out of Article 2 of the New York Private Housing Finance Law (known as the Mitchell-Lama Law)?

Opinions Below

The opinion of the Court of Appeals is reported at 500 F. 2d 1246. The opinion of the District Court is reported at 366 F. Supp. 1117. See also Appendices A and B to petition in No. 74-157.

The Statutes and Rules Involved

In addition to the statutes and rules involved in case No. 74-157, there is here involved New York Private Housing Finance Law, § 32(5), which we reproduced as Appendix E to our petition for certiorari (p. 18).

Statement of the Case

To avoid repetition, we adopt the statement set forth in the brief for the petitioners in case No. 74-157 (pp. 4-15).

Proceedings Below

We also adopt as correct the analysis of the proceedings below contained in the brief of the petitioners in Case No. 74-157 (pp. 5-7).

As to the State petitioners, it should be noted, however, that the Second Circuit passed upon Eleventh Amendment and immunity issues which the District Court, in dismissing the complaint herein, did not even reach. The Court of Appeals held the New York State Housing Finance Agency to be a "person" within the meaning of 42 U.S.C., § 1983; and found that the State itself had expressly waived immunity by the provisions of New York Private Housing Finance Law, § 32(5). See 500 F. 2d 1246, 1255-1257.

Preliminary Point

The Court of Appeals decision on the State's Eleventh Amendment and immunity defenses imposes an unnecessary and unconscionable burden on the District Court.

(1)

In the event that this Court were to permit the State's regulation of the development and financing of this new City to become the subject of litigation in federal Courts, it may be anticipated that an appropriate review of the details of such development and financing will also encumber the calendars of one or more District Court judges for years.

As a matter of court administration, this Court, even though it might not ordinarily choose to pass prior to final judgment, upon the Eleventh Amendment and immunity issues which we urge were erroneously decided by the Second Circuit, will surely recognize that it is judicially desirable not to burden the District Court with the task of reviewing unnecessarily the extraordinary issues which the State's defense of its regulatory processes will entail.

If this case were to go back to the District Court in its present posture, with the Second Circuit's rulings on the Eleventh Amendment and immunity issues as the law of the case, the State may be obligated, upon a step-by-step basis, to attempt to justify each of the regulatory decisions involved in the development, construction and financing of the new City of 15,400 housing units. Our new Rome was not built in a day. Moreover, it was built during a period when an unprecedented inflationary economy caused the developers and regulatory agency to reevaluate prior judgments repeatedly to meet constantly changing conditions. A mass of material may accumulate in this single trial which will approach the volume presented to this Court in its current October Term. If this accumulation can be dispensed with, it should be.

(2)

We shall assume, for the purpose of our argument, that the State was engaged in the regulation of "securities" in the development of this cooperatively organized, state subsidized and state-aided housing development. Of course, we adhere to the argument presented by our co-defendants (in case No. 74-157) that the State's regulation did not relate to "securities" as *federally* defined.

POINT I

The Court of Appeals completely disregarded this Court's decision in *Edelman* v. *Jordan*, 415 U.S. 651 (1974). By reason of this lapse and its failure to understand the history of New York's efforts to develop adequate housing facilities, it erroneously relied upon *Parden* v. *Terminal Railway of Alabama Docks Department*, 377 U.S. 184 (1964); and held *Employees* v. *Missouri Health Department*, 411 U.S. 279, to be distinguishable.

(1)

In determining whether Congress has, in a particular instance, exercised its power to require waiver of immunity, federal courts must, of course, exercise their skills in statutory construction. Fortunately, this Court has given a great deal of recent guidance in how these skills are to be exercised.

The first question which must be answered is whether Congress has authorized a suit of the sort sought to be brought against a class of defendants which includes the States. Justice Rehnquist stated this requirement in *Edelman, supra*, as follows (p. 678):

> "But in this case the threshold fact of congressional authorization to sue a class of defendants which literally includes States is wholly absent."

When the instant case is measured against that standard, it fails. Congress has never authorized suit under either the 1933 or 1934 Acts against a class of defendants including States for violations of Section 17(a) of the 1933 Act or Section 10(b) of the 1934 Act.

Consider first the 1934 Act, upon which the plaintiffs principally rely. That statute contains no section authorizing a private right of action against *any* defendant for violation of Section 10(b). Section 10(b), as written by Congress, was to be enforced by the Securities Exchange Commission.

Of course, the courts have implied a private right of action for violations of Section 10(b) and Rule 10b-5. But Mr. Justice REHNQUIST makes it clear that an implied right of action will not satisfy the "threshold" test of *Edelman* (p. 679):

> "And while this Court has, in cases such as *J. I. Case* v. *Borak*, 377 U. S. 426, 12 L. Ed. 2d 423, 84 S. Ct. 1555 (1964), authorized suits by one private party against another in order to effectuate a statutory purpose, it has never done so in the context of the Eleventh Amendment and a state defendant."

The logic of Justice Rehnquist's position is convincing. The question before a court looking at an asserted implied waiver of the Eleventh Amendment is whether Congress intended to require that waiver. Surely no Congressional intent to require waiver can be found in court creation of a private right of action.

Just as there is no Congressional authorization under the 1934 Act to sue a class of defendants including States, so also there is no such authorization under the 1933 Act for violations of Section 17(a). Section 17 of the 1933 Act is a criminal provision, obviously intended by Congress to be enforced as are all federal criminal laws. Congress created no private right to sue for violation of Section 17.

Some courts have implied a private right of action for violation of Section 17(a), *Mader* v. *Armel*, 402 F. 2d 158 (6th Cir. 1968). But an implied private right of action does not meet the "threshold" test of *Edelman*.

In sum, neither statute relied upon by the plaintiffs is sufficient to satisfy the test of *Edelman* v. *Jordan*. In neither act has Congress authorized suit against States for the sorts of violations alleged in the Complaint here.

(2)

In addition, this Court requires a showing that Congress intended to abrogate State immunity. *Edelman, supra*, at 678.

> "The question of waiver or consent under the Eleventh Amendment was found in those cases [*Employees, Parden* and *Petty* v. *Tennessee-Missouri Bridge Comm'n.*, 359 U. S. 275 (1959)] to turn on whether Congress had intended to abrogate the immunity in question, and whether the State by its participation in the program authorized by Congress had in effect consented to the abrogation of that immunity."

This showing must be a strong one, since

> "Constructive consent is not a doctrine commonly associated with the surrender of constitutional rights . . ." *Id.*

The court in *Edelman* adhered to its previous standard of explicit abrogation of the immunity,

> ". . . we will find waiver only where stated 'by the most express language or by such overwhelming implications from the text as will leave no room for any other reasonable construction.' *Murray* v. *Wilson Distilling Co.*, 213 U. S. 151, 171, 53 L. Ed. 742, 29 S. Ct. 458 (1909)." *Id.*

Even if there were a right of action against States under the 1933 and 1934 Acts, that would not necessarily imply

Congress intended federal court jurisdiction of that right. In *Employees, supra,* this Court affirmed its previous holding (*Maryland* v. *Wirtz,* 392 U.S. 183 (1968)) that Congress had created a right of action against the States. But the Court denied this right implied any remedy by suit in federal court. In fact, the teaching of *Employees* is that Congress can and does create rights without remedies, at least where the remedy sought is a suit against an unconsenting State in federal court.

(3)

In both the 1933 and 1934 statutes, Congress carefully preserved the jurisdiction of the States to regulate securities. Section 18 of the 1933 Act provides:

> "Nothing in this subchapter shall affect the jurisdiction of the securities commission (or any agency or office performing like functions) of any State or Territory of the United States, or the District of Columbia, over any security or any person." (15 U.S.C. § 77r)

In nearly identical language, Section 28 of the 1934 Act preserves State jurisdiction under that Act (15 U.S.C. § 78bb). It would be strange, indeed, to discover that Congress had taken such great pains explicitly to protect State regulation of securities and then silently intended that, if any State exercised that jurisdiction, it would forfeit its Eleventh Amendment immunity.

Indeed, such an argument is self-defeating. If the States had to risk federal court damage suits for huge amounts of money by regulating securities, they would all surely abandon the field. But that is clearly not what Congress intended when it so explicitly protected their jurisdiction.

(4)

In *Parden,* there was a statute which satisfied the "threshold" test of *Edelman* (See *Edelman* opinion at 678), but that is certainly not the case here. Entirely apart from

Edelman, the reach of *Parden* is severely restricted by *Employees*. In the latter case, Mr. Justice Douglas explained (p. 256):

> "Parden involved the railroad business which Alabama operated 'for profit.' [citation omitted.] Parden was in the area where private persons and corporations normally ran the enterprise."

Alabama was engaged in what Justice Douglas called an "isolated state activity" of a proprietary nature usually performed by private enterprise. There was no logical reason to exclude the tiny minority of railroad workers employed by States from the coverage of the FELA. The Court found Congress intended no such exclusion. Proprietary operation of a railroad is no essential governmental function and Alabama entered into it, the Court found, knowing it would waive its Eleventh Amendment immunity thereby.

The kind of implicit waiver found in *Parden* is as far as this Court would go. Justice Douglas held the operation of state hospitals involved in *Employees* was not a proprietary, but a governmental, function. (*Id.* at 256). And Justice Marshall, concurring, agreed Missouri had no real choice about operating its hospitals and thus did not "consent" to federal jurisdiction by continuing to operate them after the FLSA was amended. He said (p. 263):

> "For me at least, the concept of implied consent or waiver relied upon in Parden approaches, on the facts of the case, the outer limit of the sort of voluntary choice which we generally associate with the concept of constitutional waiver . . . [In contrast with *Parden*]. It obviously is a far different thing to say that a State must give up established facilities, services, and programs or else consent to federal suit."

If the ownership and operation of state hospitals is not a proprietary act which waives Eleventh Amendment im-

munity, *a fortiori* a purely governmental act such as regulation of securities does not do so.

In *MacKethan* v. *Commonwealth of Virginia*, 370 F. Supp. 1 (E. D. Va. 1974), Judge Merhige faced precisely the same issue which is now before this Court. There a receiver of a savings and loan association sought to hold the Virginia banking authorities liable under the federal securities legislation on grounds of negligent supervision. Judge Merhige dismissed the Complaint, stating (370 F. Supp. 1, 4):

> "Plaintiff now attempts to extend the *Parden* doctrine into the area of pure governmental regulation. Such effort, in the Court's view, must fail. The impetus toward application of the *Employees* rationale is stronger here than in the case in which it was announced. While the operation of hospitals is not necessarily a governmental function, the specific nature of the hospitals involved in *Employees* gave state activity in that area a traditional base. In the present context, the state activity attacked is necessarily of a governmental nature. Regulation of securities is not an endeavor in which private persons are free to participate."

There is no language in the 1933 or 1934 Acts to support the plaintiffs' theory of waiver. *Employees* holds waiver must be supported by explicit language and fails to find it in the semi-proprietary activity of owning and operating hospitals. Judge Merhige in *MacKethan* supports the conclusion that the securities situation here is even clearer than *Employees*. See also the opinion of Judge Hogan in *Mathews* v. *Fisher*, No. 8482 (S. D. Ohio 1974).

The Second Circuit's theory of waiver is not sound in any respect.

(5)

Moreover, the panel completely ignored the caveat given by Judge FRIENDLY with reference to State immunity from suit in *federal* courts, in a decision by this very same Circuit. In *Knight* v. *State of New York,* 443 F. 2d 415 (2d Cir., 1971) he carefully noted (p. 419):

> "the Supreme Court has admonished that federal courts ought not 'to be astute to read the consent to embrace a Federal as well as state courts and that only a 'clear indication' of the state's intention to submit to suit in federal courts will surmount the Eleventh Amendment's bar, *Great Northern Life Ins. Co.* v. *Read,* 322 U.S. 47, 54, 64 S.Ct. 873, 877, 88 L.Ed. 1121 (1944). See, to the same effect, *Ford Motor Co.* v. *Department of Treasury of Indiana,* 323 U.S. 459, 465-466, 65 S.Ct. 347, 89 L.Ed. 389 (1945); *Kennecott Copper Corp.* v. *State Tax Comm.,* 327 U.S. 573, 577, 66 S.Ct. 745, 90 L.Ed. 862 (1946). We find no such 'clear indication' here."

POINT II

The Court of Appeals demonstrated a complete lack of familiarity both with the functioning of New York's *Mitchell-Lama* Act and other provisions of New York's Public and Private Housing Finance Laws.

(1)

Further confusion in this litigation may be avoided by a complete deletion from the Second Circuit's opinion of its analysis relating to the defenses of the State and its Agency. The panel's rejection of the State's claim of immunity is predicated upon its citation of Private Housing Finance Law, § 32(5). A footnote in that opinion sets forth that section, with emphasis added (500 F. 2d 1246, 1256, fn. 12):

> "With regard to duties and liabilities arising out of this article the state, the commissioner or the super-

> vising agency may be sued *in the same manner as a private person.* No costs shall be awarded against the commissioner, the state, or the supervising agency, as the case may be, in any such litigation."*

With reference to the Housing Finance Agency, the panel completely overlooked the fact that the term "supervising agency" contained in the section quoted by Judge Oakes is strictly defined in Public Housing Law § 2, as follows (Subd. 15):

> "The comptroller in a municipality having a comptroller; in a municipality having no comptroller, the chief fiscal officer of such municipality; except that in the city of New York it shall be the housing and development administration."

The fact that the Agency is an "agency" does *not* qualify it as a "supervising agency". In fact, it is a financing agency. Private Housing Finance Law, Art. 3. Supervision of a state-aided limited profit company is actually assigned to the State Commissioner of Housing and Community Renewal, a person who has *not* even been made a party to this lawsuit. See Private Housing Finance Law, Art. 2; and Public Housing Law, § 3, subd. 1, Definitions (L. 1961, c. 398).

And if the purpose of this litigation is to impose any liability upon the Agency, that liability may be borne ultimately by the State itself, regardless of any prior statutory commitments or prohibitions. In this aspect of the case, this Court can not blink its eyes at the fact that in *Knight* v. *State, supra,* this same Circuit Court also pointed out (443 F. 2d, at p. 420) that Knight's suit against state

---

* The first sentence of this paragraph merely incorporated, with an appropriate addition of the words, "the supervising agency", the suability provision previously contained in Public Housing Law, § 15, as to the housing commissioner and the State. See 1964 New York State Legislative Annual, p. 342.

officers could be deemed a suit against the State, improperly brought; and noted the general rule in *Dugan* v. *Rank*, 372 U.S. 609, 620 (1963) that:

> "a suit is against the sovereign if 'the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration,' • • • or if the effect of the judgment would be 'to restrain the Government from acting, or to compel it to act.' "

See also the opinion of Judge McGowan for a unanimous court (Friendly, Ch. J. and Timbers, C.J.) in *Rothstein* v. *Wyman*, 467 F. 2d 226, 238 (2nd Cir. 1972), cert. den. 411 U.S. 921 (1973) rehearing den. 411 U.S. 988 (1973), underlining the rule that any waiver of the shield of the Eleventh Amendment must be shown to be clear and unequivocal, citing *Great Northern Life Ins. Co.* v. *Read*, 322 U.S. 47, 54 (1944) and effectively distinguishing *Parden* (*supra*).

The waiver set forth in Private Housing Finance Law can not, on its face, be deemed to be a clear and unequivocal relinquishment of the State's immunity from *federal* court suit. Moreover, the Second Circuit's analysis completely disregards the fact that, as to obligations issued by the Agency itself specific judicial remedies are provided by New York Private Housing Law, § 50.

If the terms of the Finance Agency's mortgages are to be subjected to change by the federal district courts, and supervision of non-profit state-subsidized projects is to be subjected to the vagaries of a single District Judge's conception of a tenant's expectation of profit from participation in a non-profit cooperative enterprise, the District Court's assumption of jurisdiction for that purpose will be self-defeating. The wisdom and propriety of any additional subsidies to the plaintiffs should be determined by the people's representatives in the Legislature, not by the federal courts.

(2)

A short review of New York's recent housing history will help to demonstrate how the Court of Appeals deviated from accuracy in its analysis of the functions performed by the New York State Housing Finance Agency. The facts relating to the past efforts of New York State to attack and solve its problem of slum clearance and to provide adequate housing may aid the Court in understanding the different responsibilities of the Agency and the Commissioner of Housing and Community Renewal. We shall endeavor to limit our delineation of New York's housing history to the developments pertinent to that understanding.

New York has found it necessary to use its police power and other sovereign powers in the performance of its housing functions. Shortly after World War I, it deemed it necessary and adequate to suspend the remedy of summary eviction proceedings theretofore available to landlords. See *People ex rel. Durham R. Corp.* v. *LaFetra,* 230 N.Y. 429 (1921). It has found frequent occasion to exercise its police power in the form of "rent control." *Lincoln Bldg. Associates* v. *Barr,* 1 N Y 2d 413 (1956), app. dism. 355 U.S. 12 (1957). It has also utilized eminent domain to to provide public housing for persons of low income. *Matter of New York City Housing Authority* v. *Muller,* 270 N.Y. 333 (1936); after its experiment in providing *private* housing through limited dividend housing corporations under the State Housing Law (L. 1926, ch. 823) had proved inadequate as a solution (270 N.Y., at 342).

(A)

From the outset, the provisions of the State Housing Law (L. 1926, ch. 823) indicated clearly the intention of the Legislature that limited dividend housing projects, whether incorporated as "public limited dividend housing companies" under Article 3 or as "private limited dividend companies" under Article 4 of that statute were to be under

the control and supervision of the *"State Board of Housing"*, the predecessor of the *"State Commissioner of Housing"*, now known as the *"State Commissioner of Housing and Community Renewal"*.

The detailed supervisory powers of the Board included project approval (§ 13), examination of books and records (§ 15, subd. 3), the fixing of maximum rents in accordance with statutory limits (§ 16), establishment of reserves (§ 42), selection of one of the corporation's directors (§ 32), the power to enforce stock subscriptions if the company's board of directors did not do so (§ 34), the power to consent to mortgages, debt incurrance and the making of certain contracts (§ 38, subds 3-11; 50).

In 1927, the State Board of Housing was renamed the "Board of Housing"; and its commissioners were redesignated as "members" of the Board (L. 1927, ch. 25). In 1928, the Board was given rule-making power (L. 1928, ch. 722, § 15, subd. 6 added). In 1932, the Board of Housing was continued as head of the Division of Housing in the Department of State (L. 1932, ch. 507, § 1). In 1938, the functions of the Division of Housing were transferred to the Executive Department (L. 1938, ch. 808). There they remained upon the enactment of the Public Housing Law (L. 1939, ch. 808).

The Public Housing Law, enacted in 1938, gave greater emphasis, in the solution of housing problems, to *public housing,* undertaken by municipal housing authorities, with the aid of federal, state and local subsidies. But, as to limited dividend housing, it made very little change, incorporating in one article of the law (Art. 9, §§ 170-193) and part of another (Art. 7, §§ 129-135), substantially all the provisions contained previously in the State Housing Law.

But where regulation previously had been by the State *Board,* the 1938 statute provided for regulation by the "Superintendent" of Housing; and approvals previously required by the Board, were to be obtained from the *Super-*

intendent (§ 11, *et seq.*, § 170, *et seq.*). Then in 1940, the title of the head of the Division of Housing was changed to "Commissioner of Housing" (L. 1940, ch. 148, § 3, subd. 1; § 11).

Some of this history as to the development of the regulatory functions of the Commissioner of Housing was reviewed in *Fruhling* v. *Amalgamated Housing Corp.*, 9 N Y 2d 541 (1961), app. dism. 368 U.S. 70 (1961). Another analysis of this housing history is to be found in the foreward to the Private Housing Finance Law (L. 1961, ch. 803; McKinney's Cons. Laws of New York, Annotated, Book 41, pp. vii-xii).

(B)

Not until 1955, with the enactment of the Limited Profit Housing Companies Law (L. 1955, ch. 407), popularly known as the Mitchell-Lama Law, did New York authorize the form of housing company involved in this litigation. By this form of housing, the State sought to meet the full impact of the then existing housing shortage by drawing upon its own credit and the credit of its municipalities to bridge the shortage of low-interest rate mortgage funds. Foreword to New York Private Housing Law (*supra*), p. ix.

With the enactment of the Private Housing Finance Law in 1961 (L. 1961, ch. 803, eff. March 1, 1962), the provisions controlling limited *dividend* housing companies were transferred to Article 4 of that statute (§§ 70-97); and those relating to limited *profit* housing companies to Article 2 thereof (§§ 10-37). In 1961 the title of the Commissioner of Housing was also revised to become "Commissioner of Housing and Community Renewal" (L. 1961, ch. 398). And *the Commissioner retained supervisory powers* over Mitchell-Lama limited profit companies as well as over limited dividend housing companies, 41 McKinney's Cons. Laws of New York, *supra*, Articles 2 and 4.

By the enactment of the same law the Agency was created as a "corporate governmental agency" which "through the issuance of its bonds, notes or other obligations to the private investing public" might attract a broad base of investment to obtain the funds necessary to provide mortgage loans to housing companies. Private Housing Finance Law, § 41.

(C)

The codification which placed Article 3 of the PHFL into the same volume with the Articles (2 and 4) dealing with Mitchell-Lama housing companies and limited dividend housing projects did not, as we have stated, divest the commissioner of that person's regulatory powers. It merely consolidated "without substantive change, various provisions of present law concerning governmental assistance to private enterprise for the construction of housing for families of middle income". See Governor Rockefeller's Memorandum of Approval. 41 McKinney's New York Private Housing Finance Law; foreword, p. xvii.

And the functions which were assigned in Article 3 of the 1961 statute to the new State Housing Finance Agency in no way limited the *regulatory* functions of the Commissioner of Housing and Community Renewal. Indeed, the Commissioner was, at first, designated as Chairman of the Agency (§ 43, subd. 2); but, later the Governor was authorized to designate a chairman "from among the members appointed by him" to the Agency (L. 1969, ch. 528, § 3).

The powers of the Agency were and are not supervisory. They are the powers to borrow money issue notes and bonds to obtain funds (PHFL, § 44, 46). The Agency's obligation to its creditors is to establish "reserve funds and obtain such appropriations from the state as might be required to maintain certain reserve funds at the amounts required by the statute (§ 47). *The Agency was and is*

given no authority to procure subscriptions to the stock of housing companies from any potential subscribers to such stock.

Hence there is no basis for predicating any liability upon the agency in connection with plaintiffs' stock subscriptions. Nor is there any basis at all—in either a state or federal court— for invoking as against the Agency the provision of the PHFL entitling the Agency "to sue and be sued" (PHFL, § 44). That remedy was placed there for potential bondholders or note-holders. Certainly, there was no basis for that portion of the Court of Appeals opinion (500 F. 2d 1246, 1256, fn. 12) which mistakenly applied to the Agency a statutory provision utterly inapplicable to the Agency.

Conclusion

The Second Circuit's decision ignores this Court's decision in *Edelman* v. *Jordan* (*supra*). On its face, the panel's decision completely ignores the Circuit's own holding in *Knight* v. *State, supra,* 443 F. 2d 415. It also ignores the philosophy of the decision in *Whitten* v. *State University Construction,* 493 F. 2d 177 (1st Cir. 1974). And its attempt to distinguish the recent decision in *Employees* v. *Missouri Public Health Employees,* 411 U.S. 279 (1973), on the ground that the State's housing activity came *after* the enactment of the federal securities laws is predicated upon a completely factual misconception; and a failure to recognize New York's long history of seeking to solve its housing problems by various methods including a State Housing Law (L. 1926, C. 823), which provided for limited divided housing companies (akin to limited-profit companies authorized by the Mitchell-Lama Act) *and state supervision* long before the Federal Securities Act of 1933. See *People* v. *Brooklyn Garden Apartments,* 283 N.Y. 373 (1940). See also *DeVoe* v. *Ostrander,* Civ. No. C 3, 74-95 (S.D. Ohio, decided Oct. 18, 1974), where the *Forman* rea-

soning as to waiver of State immunity for alleged improper regulation has already been rejected; and the cases cited therein.

The purpose of the Eleventh Amendment was to protect the States' fiscal integrity from attack in federal court. *Jordan* v. *Gilligan*, 400 F. 2d 701, 706. If the Second Circuit's theory in this case is adopted, it would substantially undermine that constitutional policy, for States would be target defendants in virtually every stock fraud case where they had done any regulation. States would be faced with huge contingent liabilities or the option of abandoning securities regulation. Neither result was intended by the Congress or the framers of the Eleventh Amendment.

The judgment of the Court of Appeals should be reversed and the complaint herein should be dismissed against the State and its Housing Agency.

Dated: New York, New York, March 2, 1975.

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Petitioners,
State of New York and
New York State Housing Finance
Agency

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

DANIEL M. COHEN
Assistant Attorney General

MEMBERS OF THE BAR OF THE
UNITED STATES SUPREME COURT
of Counsel

Supreme Court, U. S.
FILED
JAN 13 1975
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-647

THE STATE OF NEW YORK and the NEW YORK STATE HOUSING FINANCE AGENCY,
Petitioners,

against

MILTON FORMAN and ELLEN FORMAN, et al.,
Respondents,

and

UNITED HOUSING FOUNDATION, INC., et al.,
Additional-Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION OF THE STATE OF OHIO FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT

WILLIAM J. BROWN
Attorney General of the State of Ohio
State House Annex
Columbus, Ohio 43215

WILLIAM G. COMPTON
Assistant Attorney General of the State of Ohio
State House Annex
Columbus, Ohio 43215

JON M. SEBALY
Special Assistant Attorney General of the State of Ohio
Member of the Bar of the United States Supreme Court
390 Talbott Tower
118 West First Street
Dayton, Ohio 45402
Telephone (513) 226-6621

COURT INDEX PRESS, INC. — 809 Walnut Street, Cincinnati, Ohio 45202 — (513) 241-1450

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-647

THE STATE OF NEW YORK and the NEW YORK STATE HOUSING FINANCE AGENCY,
Petitioners,

against

MILTON FORMAN and ELLEN FORMAN, et al.,
Respondents,

and

UNITED HOUSING FOUNDATION, INC., et al.,
Additional-Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION OF THE STATE OF OHIO FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT

The State of Ohio hereby respectfully moves this Court for leave to file its Brief *amicus curiae* in support of the Petition of the State of New York for a Writ of Certiorari. Ohio seeks leave to file forthwith and prior to the Court's consideration of the Petition.

Ohio is a party defendant in two actions raising the same question presented by New York's Petition, *Devoe* v. *Ostrander,* Civ. No. C 3 74-95 (S. D. Ohio); and *Yeomans*

v. *Dept. of Banking and Securities,* No. 74-2003 (6th Cir.). Ohio accordingly believes grant of the Petition here would assist the Sixth Circuit Court of Appeals in its decision of those cases.

If the Writ is granted, Ohio intends to file a brief *amicus curiae* on the merits.

Respectfully submitted,

WILLIAM J. BROWN
Attorney General of the
State of Ohio
State House Annex
Columbus, Ohio 43215

WILLIAM G. COMPTON
Assistant Attorney General
of the State of Ohio
State House Annex
Columbus, Ohio 43215

JON M. SEBALY
Special Assistant Attorney General
of the State of Ohio
Member of the Bar of the
United States Supreme Court
390 Talbott Tower
118 West First Street
Dayton, Ohio 45402
Telephone (513) 226-6621

Supreme Court, U. S.
FILED
MAR 5 1975
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-647

THE STATE OF NEW YORK and the NEW YORK STATE HOUSING FINANCE AGENCY
Petitioners,

against

MILTON FORMAN and ELLEN FORMAN, et al.,
Respondents,

and

UNITED HOUSING FOUNDATION, INC., et al.,
Additional-Respondents.

ON CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE STATE OF OHIO, AMICUS CURIAE

WILLIAM J. BROWN
Attorney General of the
State of Ohio
State House Annex
Columbus, Ohio 43215

WILLIAM G. COMPTON
Assistant Attorney General
of the State of Ohio
State House Annex
Columbus, Ohio 43215

JON M. SEBALY
Special Assistant Attorney
General of the State of Ohio
390 Talbott Tower
118 West First Street
Dayton, Ohio 45402
Telephone (513) 226-6621

OF COUNSEL:

MICHAEL R. MERZ
SMITH & SCHNACKE
390 Talbott Tower
118 West First Street
Dayton, Ohio 45402

COURT INDEX PRESS, INC. — 809 Walnut Street, Cincinnati, Ohio 45202 — (513) 241-1460

TABLE OF CONTENTS

	Page
Introduction	1
Argument	5
Summary	5
A. *EDELMAN* v. *JORDAN, SUPRA*, PRECLUDES FEDERAL COURT JURISDICTION OF THIS ACTION: CONGRESS HAS NOT AUTHORIZED SUITS FOR VIOLATIONS OF THE 1933 AND 1934 ACTS AGAINST A CLASS OF DEFENDANTS WHICH LITERALLY INCLUDES THE STATES.	5
B. CONGRESS NEVER INTENDED TO REQUIRE WAIVER OF ELEVENTH AMENDMENT IMMUNITY AS A CONDITION OF A STATE'S ENGAGING IN THE CONCURRENT REGULATION OF SECURITIES	9
Conclusion	15

TABLE OF AUTHORITIES

Cases:	Page
Brown v. *Commonwealth of Kentucky*, No. 74-1347 (6th Cir. appeal pending)	4
Cooley v. *Board of Port Wardens*, 12 How. 299 (1851)	3
Dawkins v. *Craig*, 483 F. 2d 1191 (4th Cir. 1973)	6
Devoe v. *Ostrander*, Civ. No. C 3 74-95 (October 18, 1974, S.D. Ohio)	3, 4
Edelman v. *Jordan*, — U.S. —, 39 L. Ed. 2d 662 (adv. sheets) (1974)	4, 5, 6, 7, 8, 9, 13, 15
Employees of the Department of Public Health & Welfare v. *Department of Public Health & Welfare*, 411 U.S. 279 (1973)	4, 5, 6, 9, 10, 13, 14, 15
Forman v. *Community Services, Inc.*, 500 F. 2d 1246 (2nd Cir. 1974)	2, 11
Forman v. *Community Services, Inc.*, 366 F. Supp. 1117 (S. D. N. Y. 1973)	6
Hans v. *Louisiana*, 134 U.S. 1 (1890)	6
Jordon v. *Gilligan*, 500 F. 2d 701 (adv. sheets) (6th Cir. 1974)	6
MacKethan v. *Commonwealth of Virginia*, 370 F. Supp. 1 (E.D. Va. 1974); affd. per curiam No. 74-1249 (4th Cir. December 23, 1974)	4, 14
Mader v. *Armel*, 402 F. 2d 158 (6th Cir. 1968)	8
Mathews v. *Fisher*, Civ. No. 8482 (S.D. Ohio 1974)	4
Parden v. *Terminal Ry.*, 377 U.S. 184 (1964)	6, 13, 14
Yeomans v. *Department of Banking and Securities*, No. 74-2003 (6th Cir. appeal pending)	3, 4

Statutes: **Page**

Securities Act of 1933, 15 U.S.C. §§ 77a, et seq. 5-6, 7, 8, 10, 11, 12

Securities Exchange Act of 1934, 15 U.S.C. §§ 78a, et seq. 5, 6, 7, 8, 10, 12

Constitution of the United States:

Eleventh Amendment 2, 3, 4, 5, 6, 9, 10, 15

Other Materials:

H. R. Rep. No. 85, 73d Cong., 1st Sess. 11, 12

1 *History of the Supreme Court of the United States* (Goebel) 15

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-647

THE STATE OF NEW YORK and the NEW YORK STATE HOUSING FINANCE AGENCY

Petitioners,

against

MILTON FORMAN and ELLEN FORMAN, et al.,

Respondents,

and

UNITED HOUSING FOUNDATION, INC., et al.,

Additional-Respondents.

ON CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE STATE OF OHIO, AMICUS CURIAE

INTRODUCTION

This case is before the Court on certiorari to the Second Circuit Court of Appeals. That court had reversed a jurisdictional dismissal entered in the district court.

Ohio is concerned with the almost offhand holding by the Second Circuit that New York had either explicitly or implicitly waived its immunity to suit in federal court as to asserted violations of the federal securities laws. It

was to contest this holding that Ohio supported New York's petition for writ of certiorai.

Both Judge Pierce in the district court and Judge Oakes for the Court of Appeals have written learned opinions on the question whether shares in a non-profit cooperative housing corporation are securities within the meaning of the Securities Act of 1933 and the Securities Exchange Act of 1934. Ohio expresses no opinion on that question, although a holding that such shares are not securities will be dispositive of this case.[1]

Ohio wishes to focus on the Second Circuit's theory of implicit waiver of Eleventh Amendment immunity by New York. The Second Circuit stated its theory in this way:

> "Secondly, the State has waived its sovereign immunity with respect to federal securities laws violations by voluntarily entering a field under federal regulation. See *Parden* v. *Terminal Railway of Alabama Docks Department,* 377 U.S. 184, 84 S. Ct. 1207, 12 L. Ed. 2d 233 (1964) . . . by enacting the federal securities laws in the exercise of the Commerce Clause -- a power given to the federal government by the states in adopting and ratifying the constitution — the Congress conditioned the right to be involved in the sale and distribution of securities upon amenability to suit in federal court as provided by those regulatory laws." 500 F. 2d 1246 at 1256.

---

[1] The Second Circuit's holding on Eleventh Amendment immunity was in the alternative. The Court found explicit waiver in Section 32(5) of the Mitchell-Lama Act under which the State regulates cooperatives of the type involved in this litigation, *Forman* v. *Community Services, Inc.*, 500 F. 2d 1246 at 1256. New York vigorously denies that Section 32(5) has the effect attributed to it by the Court of Appeals. (Petition of New York at 12-13.) Ohio will not argue this explicit waiver theory. New York's grounds for opposing it are compelling.

More succinctly, the Court argues that Congress, exercising the Commerce Power in adopting the 1933 and 1934 Acts, required States to waive their Eleventh Amendment immunity as the condition of concurrently regulating the issuance and sale of securities.

The enormous implications of adopting that theory have already been argued by Ohio in its Amicus Brief in Support of the Petition for Writ of Certiorari (pp. 2-3). The decision would make States target defendants in virtually all stock fraud litigation, since every State is involved in some form of securities regulation. Ohio has twice been sued in federal court in the last eighteen months on the Second Circuit's theory of implied Eleventh Amendment waiver, *Devoe* v. *Ostrander,* Civ. No. C 3 74-95 (S.D. Ohio); and *Yeomans* v. *Department of Banking and Securities,* No. 74-2003 (6th Cir., appeal pending).

Furthermore, the theory would threaten the whole pattern of cooperative and concurrent regulation by the States and federal government which is really the prevalent mode of modern economic regulation. Vast areas of federal regulation are founded, constitutionally, on the Commerce Clause. The opinion below would effectively exclude the States from all of those areas. Logically, the Second Circuit's theory implies that States may concurrently regulate any of those areas only by surrendering their Eleventh Amendment immunity. To permit the States to be sued under federal statute in every area in which they are co-regulators would expose them to virtually unlimited liability or drive them out of concurrent regulation. Adoption of the theory would thus threaten the exercise in fact, because of the price imposed, of the power preserved to the States by this Court in *Cooley* v. *Board of Wardens of the Port of Philadelphia,* 12 How. 299 (1851) and zealously protected ever since.

That a legal theory has unacceptable consequences is of course good grounds for rejecting it. But there are more compelling grounds for rejecting the Second Circuit's implied waiver theory in this case. It has already been implicitly rejected by this Court's decisions in *Employees of the Department of Public Health & Welfare* v. *Department of Public Health & Welfare,* 411 U.S. 279 (1973); and *Edelman* v. *Jordan,* —— U.S. ——, 39 L. Ed 2d 662 (adv. sheets) (1974). Those decisions represent a concentrated effort by this Court in its last two terms to establish guidelines for judging asserted implicit waivers of Eleventh Amendment immunity. But the Second Circuit opinion being reviewed totally ignores the *Edelman* decision and attempts an extremely wooden and unconvincing distinction of *Employees.* Furthermore, it conflicts with the decision of every other federal court which has considered the implicit waiver theory advanced by Plaintiffs here. Thus, it threatens seriously to undermine the constitutional decision of this Court in *Employees, supra,* and *Edelman, supra,* as well as the work of the other federal courts which have carefully followed those decisions. See *Devoe* v. *Ostrander, supra* (decision of October 18, 1974); *Yeomans* v. *Department of Banking and Securities, supra* (dismissed sub. nom. *Mathews* v. *Fisher,* Civ. No. 8482 S. D. Ohio 1974); *Brown* v. *Commonwealth of Kentucky,* No. 74-1347 (6th Cir. appeal pending); *MacKethan* v. *Commonwealth of Virginia,* 370 F. Supp. 1 (E. D. Va. 1974).

ARGUMENT

Summary

The Second Circuit's theory of implicit waiver of Eleventh Amendment immunity, quoted above, should be rejected because it conflicts with this Court's decisions in *Edelman* v. *Jordan, supra,* and *Employees* v. *Missouri Public Health Department, supra.*

Specifically, in order to find an implicit waiver of Eleventh Amendment immunity, *Edelman* requires the existence of specific explicit Congressional authorization in the statute in question to sue a class of defendants which literally includes States; no such Congressional authorization can be found in either the Securities Act of 1933 or the Securities Exchange Act of 1934 (the "1933 Act" and the "1934 Act," respectively). Furthermore, *Employees* requires a finding of congressional intention to require states to waive their Eleventh Amendment immunity by doing some voluntary, proprietary act under the legislation in question and voluntary performance of that act by the State being sued. Nothing in the legislative history of either the 1933 or the 1934 Act supports such a finding in this case.

A. EDELMAN v. JORDAN, SUPRA, PRECLUDES FEDERAL COURT JURISDICTION OF THIS ACTION: CONGRESS HAS NOT AUTHORIZED SUIT FOR VIOLATIONS OF THE 1933 AND 1934 ACTS AGAINST A CLASS OF DEFENDANTS WHICH LITERALLY INCLUDES THE STATES.

This action, as originally brought, alleged violations of the anti-fraud provisions of the 1933 Act (15 U.S.C. §

77q (a)), and the 1934 Act and Rule 10b-5 under the 1934 Act (15 U.S.C. § 78j and 17 CFR 240-10b-5, respectively). *Forman* v. *Community Services, Inc.*, 366 F. Supp. 1117, 1120 (S.D. N.Y. 1973).

In terms, the Eleventh Amendment to the United States Constitution bars this suit and all others seeking relief against a State in federal court. The Amendment provides:

> "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens or Subjects of any Foreign State."

Here, suit is brought by citizens of New York against their own State of residence, but the Amendment has been held constitutionally to bar suits by a citizen against his own State of residence as well as against other States, *Hans* v. *Louisiana*, 134 U.S. 1 (1890); *Employees* v. *Missouri Public Health Department, supra*; *Jordon* v. *Gilligan*, 500 F. 2d 701 (6th Cir. 1974); *Dawkins* v. *Craig*, 483 F. 2d 1191 (4th Cir. 1973).

A State may, of course, waive the protection of the Eleventh Amendment. Congress, in regulating interstate commerce, may explicitly require States to waive this immunity as a condition of participating in activities regulated by the federal government, *Parden* v. *Terminal Ry.*, 377 U.S. 184 (1964). *Parden* is the sole authority relied upon by the Second Circuit below; indeed, it states its conclusion of law as a paraphrase of *Parden*.

Parden is, of course, only one of a long line of decisions of this Court on Eleventh Amendment immunity. Furthermore, the statute in question in *Parden* satisfied the test of implicit waiver as set forth in *Edelman*. Justice Rehnquist formulated that test as follows:

> "But in this case the threshold fact of congressional authorization to sue a class of defendants which literally includes states is wholly absent." *Edelman, supra,* at 678.

The instant case fails to satisfy the *Edelman* test for there is no authorization in the 1933 Act or the 1934 Act to sue a class of defendants which literally includes the States.

Suit under the 1933 Act in this case is premised upon its anti-fraud provisions, Section 17 (a) (15 U.S.C. § 77q (a)). The 1933 Act does not authorize suit by a private party against *any* defendant with respect to the provisions of Section 17 (a). Section 17 literally says that "it shall be unlawful for any person" to engage in certain fraudulent activities. Section 20 gives the Securities and Exchange Commission authority to apply to a court for an injunction against "violations" of the Act. The same section empowers the attorney general "in his discretion [to] institute the necessary criminal proceedings under this subchapter." Section 24 makes "willful violations" criminal offenses.

But the sections of the 1933 Act which are intended by Congress to be privately enforced speak of "liabilities" rather than "violations." For example, Section 11 (15 U.S.C. § 77k) refers specifically to civil liabilities on account of false registration statements. Section 21 (15 U.S.C. § 77l) refers to civil liabilities arising in connection with prospectuses and communications. Section 15 (15 U.S.C. § 77o) defines the "liability of controlling persons." The statute preserves the distinction between liabilities and offenses or violations in the jurisdictional section, Section 22 (15 U.S.C. § 77v), which provides in subsection (a):

> "The district courts of the United States . . . shall have jurisdiction of offenses and violations under this subchapter and under the rules and regulations promulgated by the Commission in respect thereto, and, concurrent with State and Territorial courts, of all

> suits in equity and actions at law brought to enforce any liability or duty created by this subchapter."

Congress, then, as is evident from the very words of the statute, did not create a cause of action under Section 17 against a class of defendants which literally includes the States.

Some courts have implied a private right of action for violations of Section 17 (a), see, e.g., *Mader* v. *Armel,* 402 F. 2d 158 (6th Cir. 1968). But Mr. Justice Rehnquist's opinion for the Court in *Edelman* makes it clear that an *implied* private right of action will not satisfy the threshold test:

> "While this Court has, in cases such as *Case* v. *Borak,* 377 U.S. 426, 12 L. Ed. 2d 423, 84 S. Ct. 1555 (1964), authorized suit by one private party against another in order to effectuate a statutory purpose, it has never done so in the context of the Eleventh Amendment and a state defendant." *Edelman, supra,* at 679.

What is true for Section 17 (a) of the 1933 Act is likewise true for Section 10b of the 1934 Act. Here also Congress created no explicit private right of action. Indeed the draftsmen employed the same grammatical construction used in Section 17 (a): "It shall be unlawful for any person, . . ." to engage in certain acts. Here also Congress intended the statute to be enforced by the Securities and Exchange Commission. The development of private rights of action by implication under Section 10b is more firmly established than that under 17 (a). But the same principle applies — an implied private right of action will not meet the threshold test of literal inclusion set forth in *Edelman.*

The Second Circuit's implied waiver theory thus fails to meet even the threshold test imposed by this Court in

Edelman. Accordingly, the Court of Appeals should be reversed on this ground alone.

B. CONGRESS NEVER INTENDED TO REQUIRE WAIVER OF ELEVENTH AMENDMENT IMMUNITY AS A CONDITION OF A STATE'S ENGAGING IN THE CONCURRENT REGULATION OF SECURITIES.

Beyond the threshold test of *Edelman*, a theory of implicit waiver of Eleventh Amendment immunity must satisfy the requirements of this Court's *Employees* decision. Advocates of any such theory must prove that Congress intended to require waiver of Eleventh Amendment immunity as a condition of a State's participating in the particular regulated federal activity.

> "The question of waiver or consent under the Eleventh Amendment was found in those cases [*Employees, supra, Parden, supra,* and *Petty* v. *Tennessee-Missouri Bridge Comm'n,* 359 U.S. 275 (1959)] to turn on whether Congress has intended to abrogate the immunity in question, and whether the State, by its participation in the program authorized by Congress, had in effect consented to the abrogation of that immunity." *Edelman, supra,* at 678.

Evidence of such congressional intent must be very strong, since "constructive consent is not a doctrine commonly associated with the surrender of constitutional rights. . . ." *Id.* Thus, this Court forcefully reminded the lower federal courts that it is a constitutional immunity which is in question; an explicit abrogation is required:

> ". . . we will find waiver only where stated 'by the most express language or by such overwhelming implications from the text as will leave no room for any other reasonable construction.' *Murray* v. *Wilson Dis-*

> *tilling Co.*, 213 U.S. 151, 171, 53 L. Ed. 742, 29 S. Ct. 458 (1909)." *Id.*

The Second Circuit's theory here is that when New York undertook concurrent regulation of securities, by that act it voluntarily waived its Eleventh Amendment immunity. Implicitly, the Court below holds Congress intended that result.

The Second Circuit theory, when measured against the strict test of *Employees,* fails utterly to convince one of its soundness. The evidence of Congressional intent, far from supporting the Court below, points strongly against any waiver.

In the first place, in adopting both the 1933 and 1934 Acts, Congress very carefully preserved the concurrent regulatory jurisdiction of the States. Section 18 of the 1933 Act provides:

> "Nothing in this subchapter shall affect the jurisdiction of the securities commission (or any agency or officer performing like functions) of any State or Territory of the United States, or the District of Columbia, over any security or any person." (15 U.S.C. § 77r).

Section 28 of the 1934 Act is nearly identical:

> ". . . Nothing in this chapter shall affect the jurisdiction of the securities commission (or any agency or officer performing like functions) of any State over any security or any person insofar as it does not conflict with the provisions of this chapter or the rules and regulations thereunder." (15 U.S.C. § 78bb).

It is peculiar reasoning which asserts that Congress, having so carefully protected the States' securities jurisdiction, intended to condition exercise of that jurisdiction on surrender of Eleventh Amendment immunity. The argument

depends on attributing a certain perverseness to the Congressional mind of the times.

Judge Oakes claimed to find conclusive support for the Second Circuit's theory in the legislative history of the 1933 Act. He argued:

> "Were there any doubt that the securities laws were intended to reach the states or their agencies, the legislative history dispels it. *See* H. R. Rep. No. 85, 73d Cong., 1st Sess. 11" *Forman, supra,* at 1257

The language to which Judge Oakes apparently has reference to is as follows:

> "Paragraph (2) [of Section 2 of the 1933 Act] defines 'person' in terms sufficiently broad to include within that conception not only an individual, but also every form of commercial organization that may issue securities. It includes within the concept of 'person' a government or a political subdivision thereof, although later sections of the bill exempt from its provisions securities issued by the United States, a State, or a Territory, or a political subdivision of any of these governmental units." H. R. Rep. No. 85, 73d Cong., 1st Sess., 11.

The very language cited indicates that State and subdivision securities were exempted by a later section of the 1933 Act, despite the breadth of the word "person." (Section 3 (a) (2), 15 U.S.C. § 77c (a) (2)).

Why was "person" defined so broadly in the 1933 Act in the first place? Not to permit a private action like the present one, under Section 17 (a) against a State, for the Act authorizes no private actions under Section 17 (a) at all. (See Argument, *supra* at 7). The answer is found in examining what governmental securities there are, other than those of the United States, States, and policical subdivisions. Securities of foreign governments had been

widely touted by the Wall Street brokerage firms in the late twenties. Investors had been hurt badly by defaults on these issues. James M. Landis, principal draftsman of the 1933 Act, points out that Congress was anxious to extend the Act's protections to Americans buying foreign government securities; it was for this reason that Section 2 (2) was drafted so broadly. Landis, "The Legislative History of the Securities Act of 1933," 28 Geo. Wash. L. R. 29 at 42.

Thus the sole reference in the legislative history to which Judge Oakes points in fact proves States were exempted. The same report notes a page earlier that: "The bill carefully preserves the jurisdiction of State security commissions to regulate transactions within their own borders." H. R. Rep. No. 85, 73d Cong., 1st Sess., 10.

While Judge Oakes' argument from the legislative history proves too little, it also proves too much, for this case is brought under the 1934 Act as well as under the 1933 Act. If a broad definition of "person" in the 1933 Act were significant, then the much narrower 1934 Act definition, which includes no governmental entities at all, must also be significant. That definition, found in Section 3 (15 U.S.C. § 78c (9)) is as follows:

> "(9) The term 'person' means an individual, a corporation, a partnership, an association, a joint-stock company, a busines trust, or an unincorporated organization."

Even if the 1933 and 1934 Acts reached securities *issued by* States and even if it were shown that Congress intended to subject States to federal court jurisdiction for violations of the Acts in the *issuance* of securities, that would not prove the waiver theory of the Court below. Issuance of securities is a proprietary function of States, in that it is an

activity which can be, and most frequently is, carried on by commercial entities. But the Second Circuit asserts a waiver here arising out of New York's *regulation* of securities. As pointed out below, this Court has refused to find Congressional intention to require waiver where a State function is governmental — as regulation certainly is — as opposed to where it is proprietary. Compare *Parden, supra,* with *Employees, supra.* Judge Oakes' argument from the text and legislative history is just not convincing.

For case authority, the Court below relied exclusively on *Parden* v. *Terminal Ry., supra,* where this Court found implicit waiver by State operation of a railroad after the FELA had been amended so as to apply, literally at least, to States. In *Parden* there was at least a statute satisfying the *Edelman* threshold test, which is not the case here. (See Argument, *supra,* at 7). More importantly, *Parden* involved a purely proprietary activity by Alabama, one which is normally conducted in our economy by private persons for profit, *Employees, supra,* at 256. In *Employees,* the operation of hospitals for the mentally ill was carefully distinguished from railroad operation. Justice Douglas pointed out that, while some hospitals were run by private persons, hospitals dealing with mental problems had been largely a governmental enterprise from the earliest days of the Republic. *Id.*

Employees should be a harder case for this Court than the instant one. The ownership and operation of hospitals is at least an activity which conceptually can be done by private individuals. In the instant case, the Second Circuit seeks to find a waiver of immunity in exercise by New York of a purely governmental function, the regulation of the issuance of securities. A more strictly governmental function can scarcely be imagined.

In a thoughtful opinion on the issue before this Court,

Judge Merhige, of the Eastern District of Virginia, decided that State regulation of securities was much more clearly governmental even than the operation of hospitals. Faced with the same theory advanced by the Second Circuit here, he concluded:

> "Plaintiff now attempts to extend the *Parden* doctrine into the area of pure governmental regulation. Such efforts, in the Court's view, must fail. The impetus of the Employees rationale is stronger here than in the case in which it was announced. While the operation of hospitals is not necessarily a governmental function, the specific nature of the hospitals involved in *Employees* gave State activity in that area a traditional basis. In the present context the State activity attacked is necessarily of a governmental nature. Regulation of securities is not an endeavor in which private persons are free to participate." *MacKethan* v. *Commonwealth of Virginia,* 370 F. Supp. 1 at 4 (E. D. Va. 1974); affirmed *per curiam* No. 74-1249 (4th Cir. December 23, 1974)

The Second Circuit's attempt to distinguish *Employees* is completely unconvincing. At Footnote 13, they argue the State activity in *Employees* came before adoption of the federal statute which purportedly required the surrender of immunity. In *Parden,* the federal statute came first and state operation of the railroad later. The Second Circuit asserts that the same is true for securities regulation. It may be that New York's regulation of cooperative housing securities came after the 1933 and 1934 Acts were adopted. But most States regulated at least some securities prior to 1933. If the Second Circuit's theory were adopted, along with its distinction of *Employees,* States' regulation adopted after 1933 or 1934 would subject them to federal court suits whereas regulations adopted before that would not. That would make absolutely no sense. In any event,

this Court did not rely on that distinction in *Employees*.

The Second Circuit's implied waiver theory finds no support in the text or legislative history of the Acts or in this Court's decisions. It should be rejected.

CONCLUSION

The Eleventh Amendment was adopted to protect the fiscal integrity of the States from money judgments in federal court, 1 *History of the Supreme Court of the United States* (Goebel) 736-42. That purpose has continued to inspire the decisions of this Court, most recently in *Employees* and *Edelman*. If the Second Circuit decision in this case is allowed to stand, it will threaten that purpose and this Court's recent work to protect it. The decision below should be reversed.

Respectfully submitted,

WILLIAM J. BROWN
Attorney General of the
State of Ohio
State House Annex
Columbus, Ohio 43215

WILLIAM G. COMPTON
Assistant Attorney General
of the State of Ohio
State House Annex
Columbus, Ohio 43215

JON M. SEBALY
Special Assistant Attorney
General of the State of Ohio
390 Talbott Tower
Dayton, Ohio 45402

OF COUNSEL:
MICHAEL R. MERZ
Smith & Schnacke
390 Talbott Tower
Dayton, Ohio 45402